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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~767~~. 424

LEW ROSEN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED AUGUST 2, 1894.

(15,651.)

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings and also in the giving of judgment in a certain indictment which was in our said court, before you, against Lew Rosen, for a violation of section 3893 of the Revised Statutes of the United States, the punishment for which is a fine of $5,000 or imprisonment at hard labor for five years, or both, as it is manifest error has intervened, to the damage of said Lew Rosen, as he complains, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that then, under your seal, distinctly and openly, you send the records or proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 25th day of July, 1894, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice
2 of the Supreme Court, the 27th day of June, in the year of our Lord one thousand eight hundred and ninety-four.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

3 [Endorsed:] E. & A. B. 1252. Supreme court. Lew Rosen, plaintiff in error, *vs.* United States, defendant in error. Writ of error. Philip Carpenter, solicitor for plaintiff in error, 38 Park row, New York city. Due service of a copy of within is hereby admitted. Dated June 27, 1894. Henry C. Platt, U. S. attorney. To —— ——. 1.40, p'd. U. S. circuit court. Filed Jun-27, 1894. John A. Shields, clerk.

Notice of Entry.

Please to take notice that the within is a copy of —, this day duly entered and filed herein in the office of the clerk of — of New York.

Dated New York, —— —, 189–.

HOADLY, LAUTERBACH & JOHNSON,
Attorneys for ——.

To —— ——.

UNITED STATES OF AMERICA, *Southern District of New York*, } ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from four (4) to seventy (70), inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of Lew Rosen, plaintiff in error, against The United States of America, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have subscribed my name and have caused the seal of said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 24th day of July, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States the one hundred and nineteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

4 Circuit Court of the United States for the Southern District of New York.

UNITED STATES
vs.
LEW ROSEN.

And now comes Lew Rosen, the defendant herein, and says that on or about the 27th day of June, 1894, this court entered judgment herein in favor of the plaintiff and against this defendant, in which judgment and proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this defendant; all of which will more in detail appear from the assignment of errors, which is filed with this petition.

Wherefore this defendant prays that a writ of error may issue in this behalf to the supreme court for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to said supreme court.

(S'g'd) PHILIP CARPENTER,
Attorney for Defendant.

(S'g'd) WM. N. COHEN, *Of Counsel.*

5 [Endorsed:] Circuit court of the United States for the southern district of New York. United States *vs.* Lew Rosen. Petition for writ of error. Philip Carpenter, solicitor for defendant, 38 Park row, New York city. Due service of a copy of within is hereby admitted. Dated ——, 189–. To ——. (Filemark:) U. S. circuit court. Filed June 27, 1894. John A. Shields, clerk.

Notice of Entry.

Please to take notice that the within is a copy of —, this day duly entered and filed herein in the office of the clerk of — of New York.

Dated New York, —— —, 189–.

HOADLY, LAUTERBACH & JOHNSON,
Attorneys for ——.

To —— ——.

6 At a stated term of the circuit court of the United States for the southern district of New York, held at the court-room, in the post-office building, in the city of New York, on the 27th day of June, 1894.

Present: Hon. Charles L. Benedict, judge.

UNITED STATES
vs.
LEW ROSEN.

This 27th day of June, 1894, came the defendant or his attorney and filed herein and presented to the court his petition praying for the allowance of a writ of error, intended to be urged by him, and praying also that a transcript of the record or proceedings and papers upon which the judgment herein was allowed, duly authenticated, may be sent to the Supreme Court, and that such other and further proceedings may be had as *may be had as* may be proper in the premises.

In consideration whereof the court does allow the writ of error.

(S'g'd) CHAS. L. BENEDICT.

7 [Endorsed:] Circuit court of the United States for the southern district of New York. United States *vs.* Lew Rosen. Order allowing writ of error. Philip Carpenter, solicitor for defendant, 38 Park row, New York city. Due service of a copy of within is hereby admitted. Dated, —— —, 189–. To —— ——. (Filemark:) U. S. circuit court. Filed June 27, 1894. John A. Shields, clerk.

Notice of Entry.

Please to take notice that the within is a copy of —, this day duly entered and filed herein in the office of the clerk of — of New York.

Dated New York, —— —, 189–.

HOADLY, LAUTERBACH & JOHNSON,
Attorneys for ——.

To —— ——.

8 United States Circuit Court, Southern District of New York.

MARCH 3RD, 1894.

The court meets pursuant to adjournment and is opened by proclamation.

Present: Hon. Charles L. Benedict, judge.

The grand jury come into court and, being called, they severally answer to their names. They present to the court the following indictment:

THE UNITED STATES
vs.
LEW ROSEN.
} U. S. Rev. Stat., § 3893.

9 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, begun and held in the city of New York, within and for the district and circuit aforesaid, on the — day of January, in the year of our Lord one thousand eight hundred and ninety-four, and continued by adjournment to and including the — day of ——, in the year of our Lord one thousand eight hundred and ninety-four.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The jurors of the United States of America within and for the district and circuit aforesaid on their oath present that Lew Rosen, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the twenty-fourth day of April, in the year of our Lord one thousand eight hundred and ninety-three, at the southern district of New York and within the jurisdiction of this court, did unlawfully, willfully, and knowingly deposit and cause to be deposited in the post office of the city of New York, for mailing and delivery by the Post Office establishment of the United States, a certain obscene, lewd, and lascivious paper; which said paper then and there, on the first page thereof, was entitled "Tenderloin Number, Broadway," and on the same page
10 were printed the words and figures following—that is to say: "Volume II, number 27; trade-mark, 1892; by Lew Rosen; New York, Saturday, April 15, 1893; ten cents a copy, $4.00 a year, in advance;" and thereupon, on the same page, is the picture of a cab, horse, driver, and the figure of a female, together (underneath the said picture) with the word "tenderloineuse," and the said paper consists of twelve pages, minute description of which, with the pictures therein and thereon, would be offensive to the court and improper to spread upon the records of the court, because of their obscene, lewd, and indecent matters; and the said paper, on the said twenty-fourth day of April, in the year one thousand eight hundred and ninety-three, was enclosed in a wrapper and addressed as follows—that is to say, "Mr. Geo. Edwards, P. O. box 510, Sum-

mit, N. J."—against the peace of the United States and their dignity and contrary to the statute of the United States in such case made and provided.

HENRY C. PLATT,
U. S. Attorney.

(Endorsed:) U. S. circuit court. The United States of America *vs.* Lew Rosen. Indictment, mailing obscene matter, U. S. Rev. St., sec. 3893, as amended Sept. 26, 1888. Henry C. Platt, U. S. district attorney. A true bill. John W. Condit, foreman. Filed in open court the 3rd March, 1894. March 14, 1894, the defendant arraigned and indic't read. Def't pleads not guilty. Tried March 26, 1894. The defendant tried. Verdict, guilty. Remanded. 11 Mo. for leave to make mo. for new trial made. Bail in $2,500, '94, June 2. Sentenced to thirteen (13) months' imprisonment at hard labor and $1 fine. Sentence to be executed at the Erie C'ty p't'y. U. S. circuit court. Filed Mar. 3, 1894. John A. Shields, clerk.

12 MARCH 14TH, 1894.

The court meets pursuant to adjournment and is opened by proclamation.

Present: Hon. Charles L. Benedict, judge.

THE UNITED STATES
vs.
LEW ROSEN.

On motion of U. S. attorney, ordered arraignment.

The defendant on being arraigned pleads not guilty.

13 MONDAY, *March 26th*, 1894.

The court meets pursuant to adjournment and is opened by proclamation.

Present: Hon. Charles L. Benedict, judge.

THE UNITED STATES
vs.
LEW ROSEN.
Sec. 3893.

On motion of U. S. attorney, ordered trial; the defendant present.

Jurors Sworn.

Charles A. Schneider, Mark Samter, Alfred D. Hewitt, Thomas Edwards, Isaac O. Taylor, David S. Tuska, John H. Drew, David A. Demarest, Horace H. Thayer, Edward L. Angell, Columbus O. D. Iselin, Jacob S. Bleyer.

Mr. John O. Mott, assistant U. S. attorney, opens cause in behalf of prosecution.

Evidence for Prosecution.

Anthony Comstock sworn.

Mr. Carpenter opens cause in behalf of defendant.

14 *Evidence for Defendant.*

Lew Rosen sworn.
Charles M. Hough "
Herbert H. Walker "
Marcus Stine "

Rebuttal for Prosecution.

Arthur T. Seymour sworn.

15 TUESDAY, *March 27th*, 1894.

The court meets pursuant to adjournment and is opened by proclamation.

Present: Hon. Charles L. Benedict, judge.

THE UNITED STATES } Sec. 3893.
vs.
LEW ROSEN. }

The above cause being still on trial, the jurors are called and severally answer to their names; the defendant present.

Evidence for Defendant.

Arthur T. Seymour recalled.
H. Quintus Brooks sworn.

Rebuttal for Prosecution.

Anthony Comstock recalled.

Mr. Carpenter sums up in behalf of defendant.

Mr. Mott, ass't U. S. attorney, sums up in behalf of prosecution.

Charge is thereupon given by the court to the jury, who retire in charge of an officer duly qualified to attend them, and on their return they say that they find the defendant guilty of the charges in the indictment contained, and so say they all.

16 On motion of U. S. attorney, prisoner is remanded for sentence.

Motion made by and granted defendant's attorney for leave to make motion in arrest of judgment and for new trial. Bail fixed at $2,500, subject to approval of U. S. attorney.

17 WEDNESDAY, *May 9th*, 1894.

The court meets pursuant to law and is opened by proclamation.

Present: Hon. Charles L. Benedict, judge.

THE UNITED STATES
vs.
LEW ROSEN.

A motion for new trial and in arrest of judgment in the above cause coming on to be argued—

Mr. William N. Cohen is heard in support of motion, Mr. John O. Mott, assistant U. S. attorney, in opposition.

18 MONDAY, *May* 14, 1894.

The court meets pursuant to adjournment and is opened by proclamation.

Present: Hon. Charles L. Benedict, judge.

THE UNITED STATES
vs.
LEW ROSEN.

Motions for new trial and in arrest of judgment denied.

(Oral decision by the court.) (See orders entered as of June 27, '94.)

19 WEDNESDAY, *June 27th*, 1894.

The court meets pursuant to adjournment and is opened by proclamation.

Present: Hon. Charles L. Benedict, judge.

THE UNITED STATES
vs.
LEW ROSEN.

On motion of U. S. attorney, ordered sentence.

The court thereupon proceeds to pass judgment and sentence the prisoner, Lew Rosen, to be imprisoned for a period of thirteen (13) months at hard labor and to pay a fine of one dollar ($1); sentence to be executed at the Erie County penitentiary.

20 At a stated term of the circuit court of the United States for the southern district of New York, held in the post-office building, in the city of New York, on the 8th day of May, 1894.

Present: Hon. C. L. Benedict, judge.

UNITED STATES
vs.
LEW ROSEN.

The defendant above named having moved during the term at which his trial herein was had to arrest judgment herein on the

ground that the indictment upon which said defendant has been convicted is fatally defective for the reason, among others, that the indictment fails to state that said defendant knew that the contents of the paper deposited in the mail was obscene, lewd, and lascivious.

Now, after hearing William N. Cohen, Esq., of counsel, in support of said motion, and John O. Mott, Esq., in opposition thereto, it is hereby—

Ordered that the said motion be, and the same hereby is, in all respects denied.

CHAS. L. BENEDICT.

21 Endorsed: Circuit court of United States, southern district of New York. United States against Rosen. Order denying motion for arrest of judgment. Philip Carpenter, attorney for pl'ff, 38 Park row, New York city. Due service of a copy of within is hereby admitted. Filed in court May 17, 1894.

22 At a stated term of the circuit court of the United States for the southern district of New York, held in the post-office building, in the city of New York, on the 8th day of May, 1894.

Present: Hon. C. L. Benedict, judge.

UNITED STATES
vs.
LEW ROSEN.

The defendant above named having moved during the term at which his trial herein was had to set aside the verdict of the jury and for a new trial on the following grounds:

(1.) Upon exception duly taken by defendant upon the trial herein;

(2.) On the ground that the verdict is against the evidence;

(3.) That the verdict is contrary to the law;

(4.) That the indictment herein is fatally defective in matters of substance:

Now, after hearing William N. Cohen, of counsel, in support of said motion, and John O. Mott, Esq., in opposition thereto, it is hereby—

23 Ordered that the said motion be, and the same hereby is, in all respects denied.

CHAS. L. BENEDICT.

Endorsed: Circuit court of the United States, southern district of New York. United States against Lew Rosen. Order denying motion for new trial. Phillip Carpenter, attorney for pl'ff, 38 Park row, New York city. Due service of a copy of within is hereby admitted. Filed in court May 17, 1894.

24 Circuit Court of the United States for the Southern District of New York.

UNITED STATES
vs.
LEW ROSEN. } Bill of Exceptions.

The defendant above named was indicted at the January term of the United States circuit court for the southern district of New York for a violation of section 3893 of the Revised Statutes of the United States.

The indictment is as follows:

"Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, begun and held in the city of New York, within and for the district and circuit aforesaid, on the — of January, in the year of our Lord one thousand eight hundred and ninety-four.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The jurors of the United States of America within and for the district and circuit aforesaid on their oath present that Lew Rosen, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the twenty-fourth day of April, in the year of our Lord one thousand eight hundred and ninety-three, at the southern district of New York and within the jurisdiction of this court, did unlawfully, wilfully, and knowingly deposit and cause to be deposited in the post office of the city of New York, for mailing and delivery by the Post Office establishment of the United States, a certain obscene, lewd, and lascivious paper; which said paper then and there, on the first page thereof, was entitled 'Tenderloin Number, "Broadway,"' and on the same page were printed the words and figures following—that is to say: 'Volume II, number 27; trade-mark, 1892; by Lew Rosen; New York, Saturday, April 15, 1893; ten cents a copy, $4.00 a year, in advance;' and thereupon, on the same page, is the picture of a cab, horse, driver, and the figure of a female, together (underneath the
25 said picture) with the word 'tenderloineuse,' and the said paper consist of twelve pages, a minute description of which, with the pictures therein and thereon, would be offensive to the court and improper to spread upon the records of the court, because of their obscene, lewd, and indecent matters; and the said paper, on the said twenty-fourth day of April, in the year one thousand eight hundred and ninety-three, was enclosed in a wrapper and addressed as follows—that is to say, 'Mr. Geo. Edwards, P. O. box 510, Summit, N. J.,'—against the peace of the United States and their dignity and

contrary to the statute of the United States in such case made and provided.

HENRY C. PLATT,
U. S. Attorney.

(Endorsed:) U. S. circuit court. The United States of America *vs.* Lew Rosen. Indictment, mailing obscene matter, U. S. Rev. St., § 3693, as amended Sept. 26, 1888. Henry C. Platt, U. S. district attorney. A true bill. John W. Condit, foreman. U. S. circuit court. Filed Mar. 3, 1894. John A. Shields, clerk."

The defendant was arraigned on the 14th day of March, 1894, and pleaded not guilty; and afterwards, to wit, on the 27th day of March, 1894, the issue aforesaid joined on said indictment by the plea of not guilty came on duly to be tried before the Honorable Charles L. Benedict and a jury.

The United States was represented by Edward Mitchell, United States attorney, and John O. Mott, assistant United States attorney, and defendant was represented by his counsel, Philip Carpenter.

In the course of the trial and before the rendering of the verdict therein the said counsel for the defendant did take and allege sundry exceptions to the rulings and charge of the court, which exceptions are hereinafter set forth.

To maintain the said issues on the part of the United States the counsel for the prosecution called as a witness ANTHONY
26 COMSTOCK, who, being sworn and examined on behalf of the United States, testified as follows:

Direct examination by Mr. MOTT:

I am a United States post-office inspector and secretary of the New York Society for the Suppression of Vice, and was in April, 1893. I saw a copy of this paper about the time it was issued.

Q. What did you do in regard to it?

A. I wrote a letter, which I mailed at Summit, N. J., on the 19th day of April, 1893, and on the 20th day of December, 1893, I saw that letter in the hands of the defendant. I have the original letter, which was brought into court on the 20th of December. The letter I wrote was signed George Edwards. That is the original letter, with the exception of the purple pencil-marks on the face. It was addressed to H. Q. Brooks, business manager, of Broadway, 8 Union square, N. Y. city. I saw this defendant in reference to this paper.

Mr. CARPENTER: I might say that there is no dispute whatever about the fact that this defendant caused to be mailed this copy of this letter to Mr. George Edwards, who was really Mr. Anthony Comstock.

The COURT: Then the mailing of that paper by the defendant to George Edwards is admitted?

Mr. CARPENTER: The admission is to George Edwards, who was a fictitious person.

Mr. MOTT: I offer this paper in evidence.

Marked Exhibit 1, and as follows:
(Take in paper.)

27 The Government rests.

Cross-examination by Mr. CARPENTER:

I testified on the previous trial of this same offense against Mr. Brooks, the business manager of Mr. Rosen.

I did not swear that the wrapper which enclosed this paper which is put in evidence was in the handwriting of Mr. Brooks. I testified Mr. Brooks stated that it was his handwriting. It was proved upon the trial that it was written by Mr. Seymour.

Q. Didn't you produce the letter and haven't you got it here today written by Mr. Brooks?

A. There was correspondence.

Q. You have got that here today and you produced the wrapper and said they were in the same handwriting?

—. I received this paper myself under the name of George Edwards. I assumed that name in Summit, N. J., for the purpose of making post-office investigations for the violations of the postal laws.

I am now known in Summit, N. J., by the name of George Edwards to anybody except the postmaster. It is an address I used for the purpose of making official investigations through the mail.

I don't know that I have subscribed for other papers at Summit, N. J., under the name of George Edwards.

Redirect examination by Mr. MOTT:

I received that letter in connection with that paper; I think, the 26th day of April, 1893.

28 Letter marked Exhibit No. 2 for identification.

The COURT: What is your defense here?

Mr. CARPENTER: That this is not obscene. I now move to dismiss on the face of the matter offered in evidence and in the indictment, on the ground that the paper is not obscene.

Motion denied. Exception taken.

LEW ROSEN sworn and examined as a witness in his own behalf.

Direct examination by Mr. CARPENTER:

I was the publisher of "Broadway."

Q. Is that paper being published at the present time?

The COURT: I do not think that is material.

Exception by defendant.

This copy of this paper was mailed to Mr. George Edwards in April, 1893, nearly a year ago.

I was indicted in January and arrested in December.

I caused this blacking to be done over this copy of Broadway.

I ordered it to be done. I ordered it to be done on the entire edition. It was so done on the entire edition sent out. No clean copy was sent out. This is a clean copy of that number of Broadway. No copy of that kind was sent through the mails or any other way to my knowledge or by my orders; none were sent to the newsdealers.

Q. How did you happen to black that edition?

29 The COURT: That does not make any difference. If he mailed the paper, as he admits he did, he committed the crime if the jury find what he mailed was obscene.

Exception by defendant.

Q. Did you intend to mail any lewd, obscene, or lascivious paper?

Objected to by Government. Objection sustained. Exception by defendant.

Mr. CARPENTER: I offer this clean paper in evidence.

Marked Exhibit 2 and as follows:

(Take in paper.)

30 I was born in Baltimore, and have lived there since I have been a boy. I live here now.

I was graduated from Dartmouth college in 1877, and I have been in the newspaper business off and on ever since.

After graduating I was tutor to the son of ex-Minister Noyes, in Paris, for three years. While in Paris I began the writing of a work that was afterwards published in New York city by Henry Holt & Company, "The Influence of the American Revolution on the French."

Q. You have been the author of various works in addition?

Objected to by Government. Objection sustained. Exception by defendant.

Q. You had a fire at the place where this paper was printed last December, didn't you?

A. Yes, sir.

The COURT: How is that material?

Mr. CARPENTER: I want to show that the paper has stopped.

Objected to by Government. Objection sustained. Exception by defendant.

CHARLES M. HOUGH sworn and examined as a witness for defendant.

Direct examination by Mr. CARPENTER:

I am a lawyer practising in New York city and have been for eight or nine years.

31 I first make the acquaintance of Mr. Rosen when I entered Dartmouth college, N. H., in 1875. He was two years ahead of me.

I have known him since I came to New York, in 1884 or 1885.
From what I have known *to* Mr. Rosen's reputation, I believe it to be good.
I have never heard anything against him.

HERBERT H. WALKER sworn and examined on behalf of the defendant.

Direct examination by Mr. CARPENTER:

I am an attorney practicing in this city, in the Potter building, and have been since 1882, I think.
I was a classmate at college with Mr. Rosen for about three years, 1874 to 1877. I graduated in 1877, the same time he did.
I have known Mr. Rosen since I came to this city. Mr. Rosen's reputation is very good, of the very best. I have never heard anything against him He had a good reputation in college and, so far as I know, here.

MARCUS STINE sworn and examined as a witness for defendant.

Direct examination by Mr. CARPENTER:

My place of business is at 25 Pine street, New York city.
I have been engaged in business in this city for 13 years.
I have known Mr. Rosen six or seven years, and I have
32 known him very intimately. I have known him in a social way, not in a business way. His reputation is very high, very good. I never heard a word against him.
I knew about his running Broadway—about being the proprietor of it.

Cross-examination by Mr. MOTT:

I think I saw this paper in question. I am not sure. I have looked at this paper you hand me. I knew he published that paper.

The defendant rests.

ARTHUR T. SEYMOUR sworn and examined on behalf of the Government.

I worked in the office of Broadway. I was there at the time of the issuing of the Tenderloin edition.
Q. Did you write that letter?

Objected to by defendant as immaterial. Objection overruled. Exception.

A. I did.
Q. Do you know Mr. Rosen?
A. I do.
Q. Did you write that letter by direction of Mr. Rosen?
A. By general directions.

Letter marked Exhibit 8, and the same is, viz:

33 N. Y., *April* 25, 1893.

Mr. E. Edwards.

DEAR SIR: Yours of the 25th inst. at hand.

There has been no practical joke played upon you at all, as we were compelled to black the whole addition up in the same manner. It is only lamp black, however, and is easily erased with a piece of bread.

Very truly yours, "BROADWAY,"
Per "A. T. S."

34 By the COURT:

Q. What do you mean by "general directions," when you said you wrote that letter by general directions?

A. I meant that I had not any special directions to write that particular letter.

Q. What directions do you have?

A. I had general directions that if complaints came in——

Q. About that blackened paper?

A. That I could write a letter explaining.

Q. In that way?

A. Yes; not in those very words.

Cross-examination by Mr. CARPENTER:

Mr. Rosen just said that if I had complaints come in like that to write them a letter telling them how they could remove this if they wished to do so. If people who got the lamp-blacked edition complained about it and wrote about it, I was to instruct them how they could remove the lamp-black.

I had no special instructions about this particular letter.

By Mr. MOTT:

I would not swear that that is a copy of the letter I received. The original letter I haven't got. I would not swear to this copy, because I cannot make out all the writing.

35 Q. Did you write this in answer to a letter received by Mr. Rosen?

Objected to as incompetent and immaterial. Objection overruled. Exception.

A. Yes; I wrote that letter. I did not show the letter or have any conversation about the letter this was written in answer to before I wrote this. The letters were not opened by me. They were opened either by Mr. Brooks or Mr. Rosen and turned over to me, without any directions about an answer to that particular letter. Nothing was said about it. Mr. Rosen gave me general directions. I don't remember just exactly what they were. I testified I had general directions to write letters when complaints came in.

Mr. MOTT: I call upon the defendant to produce the letter.

Mr. CARPENTER: I haven't any such letter.

ANTHONY COMSTOCK was recalled by the Government and testified:

The paper I have in my hand is a copy of a letter which I wrote and mailed on the 25th day of April, 1893.

Mr. CARPENTER: When this is offered in evidence I want my objection on the record that it is incompetent and immaterial and because the original has not been accounted for.

The original letter I mailed in an envelope and addressed to H. Q. Brooks, business manager, Broadway, 8 Union square, N. Y., and I made an exact copy of that paper at the time, and no one saw or knew its contents, and I have that exact copy here.

36 Mr. CARPENTER: Your honor, it now appears that it was addressed to Mr. Brooks, who has not been proved to be the business manager, and we object to it on that further ground.

I have known Mr. Brooks since June, 1893.

I had a conversation with him in regard to this edition of Broadway on the 23rd day of June, 1893, in the office of Broadway newspaper. He said something in regard to his connection with the paper.

I know the defendant also.

I had a conversation with him in regard to this paper and in regard to Mr. Brooks' connection with the paper.

The defendant came to me or spoke to me in the commissioner's room on the afternoon of the 2nd day of June, here in this building. He said that Mr. Brooks was a poor man, with a family; that he was his employee and business manager, and that he was responsible for whatever Mr. Brooks had done.

On the 20th day of December, 1893, in this room, I heard Mr. Rosen swear under oath, in this court, that he was the owner and proprietor, sole proprietor, and that Mr. Brooks was his manager and had nothing to do with this matter except as his employee.

Q. Did he say anything about the mailing of this paper?

A. Yes, sir.

Q. What did he say about that?

The COURT: It is admitted that he mailed it.

37 Mr. MOTT: I understand that, but I want to show that he admitted this was mailed by his directions in order to clear Mr. Brooks. This letter was addressed to Mr. Brooks.

The COURT: If you will admit that that letter was authorized to be written by the boy, that is an end to it.

Mr. CARPENTER: We simply admit that the boy had general directions to answer letters about the lamp-blacked copy.

The COURT: They may prove that there was a complaint about the blacking on the paper, and the best way to prove it is to produce the copy of the complaint, as long as you will not produce the original.

Exception by defendant.

Q. Now, read that copy.
A.—

"APRIL 25, 1892.

SIR: Upon my return from Cincinnati yesterday I received your paper. Some boy or printer's devil has been playing a joke on you, as the paper on three pages is marred with a black substance marked over them. I think you ought to hunt the fellow up and make an example of him. Please see that this is made right and oblige,

Hastily yours, G. EDWARDS, *Box* 510."

Mr. MOTT: We offer that in evidence.

Same objection. Overruled. Exception by defendant.
Letter marked in evidence, Exhibit No. 3.

By Mr. CARPENTER:

This is the same Mr. Brooks that was acquitted last December.

AUTHUR T. SEYMOUR recalled.

Direct examination by Mr. MOTT:

Q. How did you come to write that letter?

Objected to as incompetent. Overruled. Exception.

38 A. I wrote that in answer to a letter which Mr. Comstock read; but, if I remember rightly, Mr. Comstock has not produced an exact copy of that letter, for I now remember that he said near the end to send this paper to him for six months and he would send us $2 on receipt of bill, and if at the end of that time we heard no more from him to continue.

Q. Look at that and see if that letter will refresh your recollection of what you are talking about now.

A. I have got them mixed, I guess.

Q. Now, what do you think about that copy Mr. Comstock read?

A. As near as I can remember, that is the copy.

Q. According to your best recollection, is that the letter Mr. Comstock wrote and the original letter you have in your hand in answer to it?

A. To the best of my recollection, yes.

Cross-examination by Mr. CARPENTER:

The one he just read on the stand is a copy. To the best of my recollection, I think it is.

I had no special instructions from Mr. Rosen about answering this letter of Mr. Comstock's that was signed George Edwards, on April 19th. I had no special instructions; it was just general instructions.

I left Mr. Rosen's employ January 13, 1894. I have not been employed by him since in any way.

I am employed downtown here in some other capacity.

I was subpœnaed by the district attorney to appear here.

39 I have not had any conversation with Mr. Rosen about my testimony in any way.

Mr. MOTT: We rest.

H. QUINTUS BROOKS sworn and examined on behalf of defendant.

Direct examination by Mr. CARPENTER:

I was the business manager of Broadway at one time. I was indicted for sending out this particular number in question and acquitted in December.

I did not give any instructions to the young man Seymour, who just testified, to write the letter, Exhibit 2, dated April 26, and use the language in that letter he does use. I never told him to write to anybody that we were compelled to blacken the edition.

It was not a fact that we were compelled to blacken it. Mr. Rosen and I caused it to be blackened of our own free will and accord. It was done for an advertising purpose alone. Decidedly that was the purpose, because the edition was thrown on his hands.

Cross-examination by Mr. MOTT:

The edition was thrown on his hands. We had a dispute with the news company for the week before. I did not hear the dispute.

I know as a matter of fact they did not refuse to accept the papers. He refused to give it to them because he had a quarrel with Mr. Farrelly, the president of the American News Company, about a paper that appeared the week before, which he called the Gymnasium number, or something to that effect, and that edition was never sent out of the news company at all, and a copy of

40 that particular edition, the Tenderloin number, was never submitted.

I did not say that there was never a copy sent out; I said it was never sent to the American News Company; it was sent out, though.

Redirect examination by Mr. CARPENTER:

Mr. Farrelly is the manager of the American News Company.

Q. And had to do with the business of Broadway?

The COURT: I don't see that this is material.

Mr. CARPENTER: Your honor will remember that Mr. Mott stated in his opening that this edition was suppressed, and that was the reason they blacked it. Now, that was not the fact, and Mr. Mott has just called out the fact that the American News Company did not refuse it for that reason, and I am simply examining him in redirect.

Q. Didn't Mr. Rosen and yourself get the idea of blacking it from the system of press censorship in Russia?

Objected to as immaterial. Sustained. Exception.

I heard Mr. Comstock's testimony on my own trial last December.

Q. Did you hear him then swear that you wrote the direction on the wrapper of the paper that was sent to George Edwards, Summit, New Jersey?

Objected to as immaterial. Sustained. Exception.

41 Testimony closed.

During the summing up by Mr. Carpenter he commenced to read to the jury the opinion of Judge Dillon, delivered in the Whittier case.

The court declined to permit the opinion to be read.

The defendant excepted to the ruling.

The foregoing constitutes all the testimony and evidence given on the trial herein.

Charge.

BENEDICT, *J.*:

GENTLEMEN OF THE JURY: Cases of this description come into this court because they relate to the mails of the United States.

The United States are charged with the duty of carrying the mails, and they have a right to determine what shall be carried therein. They have by this statute, under which this prosecution is brought, made a declaration that they will not carry obscene matter. If any one wants to send obscene matter they must go to the express companies or get some other method of conveyance. Therefore, this statute has been passed, in which it is declared that an obscene paper is contraband in the mail and shall not be carried therein. In order to enforce this and protect the mail against being burdened with this class of matter, they have made it an offence for anybody to put an obscene paper in the mail for the pur-

42 pose of being carried.

It is a very important statute. I think not always properly estimated, because it is *now* always considered what a wonderful engine for distribution the mail department is. Things can be carried by mail when they cannot be carried in any other way. School children, ladies' seminaries, colleges, young men, are easily put in possession of obscene matter by the mail of the United States. A letter comes to them; nobody opens it; it is delivered to them; they can be reached in that way when they cannot be reached by any other method of conveyance. There is no statute more important in reference to the mail than this statute.

This prisoner is charged with having mailed a paper which is said to be obscene, and he is brought before you for trial. The course of the argument makes it proper for me to call your attention to the methods of criminal trials. In our country no man can be sent to prison without he is indicted and tried before a jury of twelve men. Those twelve men are selected to decide—what? The law? No; their duty is to decide the fact. It is an advantage for a judge to obtain the assistance of twelve intelligent men and ask them to tell him what the fact is in this particular case. When I

know by their verdict what the fact is, then it is my duty to give judgment. The jury pronounces no judgment. It is the judge who pronounces judgment in accordance with the facts which the jury tells him, and I put it to you to tell me what the fact is
43 in this case, and as you inform me what that fact is I shall pronounce judgment. This is the only way in which criminal trials can be conducted. If the jury undertakes to decide the law, then we must have twelve lawyers in the box, and there might be twelve opinions of the law. You cannot lawfully, therefore, undertake to decide the law. You must decide on the facts from the evidence which is produced before you. I advise you not to take the responsibility of a judge upon you. Do not undertake to settle the law in this case. Under the law of the United States, I can express to you my opinion of the facts. I might say to you, "Gentlemen, you have to decide whether this paper is obscene. In my opinion, it is obscene, but you must say whether you think it is;" but I do not give you that as my opinion. I express no opinion. In this class of cases I am better satisfied with the verdict of twelve intelligent men on such a question. It has been urged here, and I wonder at it, that you should decide this case in favor of the defendant because *before* you think the public interests do not require such a prosecution. That question is not for you or for me. It is for the district attorney. He is the sworn officer whose duty it is to determine whether it is worth while to prosecute. He does not prosecute every case, but prosecutes in his own judgment. So you are not asked by me the question whether you think this prosecution ought to be brought or not; that is not the question I put to you. I want no answer upon the question. The district attorney must answer that question on his own responsibility, when it
44 is put to him. So it has been said that the punishment is enormous. Whether it shall be five years or one day is not the question put to you. I shall not ask you that. I have to decide that. Do not decide this case on the theory that you can say how much punishment this man will have if convicted. You do not, any of you, know that. You do not know whether he will be punished at all, for I have the right to suspend sentence if I think wise. All you have to do is to answer the question I will put to you, and on your answer I will give the judgment which the law requires. Now, this offense contains the two elements which must exist to warrant a conviction—some act done with some intent. The statute does not say that if a man mails a letter with intent to debauch a woman he shall be punished. It does not say that if he mails such a paper with intent to circulate it among school boys he shall be punished. It says simply that he shall be punished if he mails a letter or paper that is obscene. The intent in this case is not the most material question here, because the defendant admits that he mailed the paper. He says he mailed this paper which is put in evidence, and that he intended to mail it. So you will find, I assume, that, according to his admission, he did it, because he said he did. I stopped the entire proof because he says he mailed

it. The act of putting that paper in the mail is admitted by the defendant.

But the mailing of everything is not against the law; only
45 the mailing of obscene paper is against this law. He does not admit that the paper he mailed is obscene. The Government must therefore prove that it is obscene, and that is the question of fact I put before you, because, according to his admissions, you will find that he mailed the paper, and that he knew what paper he put in the mails. Whether it is obscene or not is the material question of fact you are to decide. How will you determine whether a thing is obscene or not? I will give you the test by which you can determine whether any publication or newspaper is obscene or not. I put upon you the responsibility of deciding the question whether, judged by that test, this paper is obscene.

It was urged here by counsel for the defendant that the paper to be judged was the paper not blackened. If they did not concede that, then I should charge you that if a man mails an obscene print blackened over and gives notice how to run the blacking off so as to disclose an obscene print, the print is obscene, for as soon as the blacking is rubbed off an obscene print is disclosed; but I understand counsel for the defendant to take that out of the case and to say that the defendant is to be judged by the paper when the blacking is rubbed off.

Now, this is the test of obscenity. This is the test by which you must judge this paper, and, judged by this test, you will give me your verdict of guilty or not guilty, according as you find this paper to be obscene or not obscene. The test of obscenity is
46 whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influence and into whose hands a publication of this sort may fall. The question is not whether Mr. Comstock's morals could be injured by this paper. It is the morals of those into whose hands it may fall. If this paper had a tendency to deprave and corrupt the morals of those whose minds are open to such influences and into whose hands a publication of this sort may fall, it is obscene. Would it suggest or convey lewd thoughts and lascivious thoughts to the young and inexperienced, not to Mr. Comstock? This case turns upon that question.

There is another point which I cannot allow to pass without some notice. Reference has been made to another verdict in another case in reference to this newspaper. You will not decide this case upon that. You don't know what that trial was, nor do I, it seems; but whether another jury did right or wrong you cannot tell, and it makes no difference whether another man had been acquitted or not. Each case must stand upon its own testimony and its own law.

It has been urged to you that there are other publications worse than this. It may be so, but that is not the question here. Other papers have been suggested, but they are not in evidence. I don't know and you don't know but what they are all indicted and

coming on before the next jury. I say this to show you how wrong it would be for you to base your verdict on this question of
47 fact which I have put to you upon the question whether there are other papers worse. The question I put to you is, in regard to this paper, whether, judging by this test, it is obscene.

It is said that the paper has been stopped. I do not see how that can be considered by you. You don't consider when a man is tried for thieving that he has not stolen anything since he was tried. Whether he has stopped this paper may be proper to suggest to me if I am called to pass judgment, but not so you.

It is said that this defendant was not indicted until January. The law gives the district attorney three years in which to decide whether he shall indict. He may delay his action because a witness is sick or for some other reason. You cannot acquit a man because the district attorney took the three years the law gives him in which to file his indictment.

It is said that this paper is a special number. If it is obscene, the statute says it cannot be mailed, regardless of the fact of whether it is a special number or not. All those questions are not questions for you. They might be suggested in order to possibly induce you to find a verdict upon some other than the simple questions I put to you and which you are bound to take as the only questions for your decision.

In all criminal cases proof of the man's good reputation is allowed. The proof is here that the man has borne a good reputation. There is a distinction between reputation and char-
48 acter. If a man has a good reputation among his neighbors and associates he is entitled to put it in evidence in order to enable the jury to weigh the testimony. It has been said that his career has been good; that he has been a literary man; but I do not see how that is material. Literary men cannot, with impunity, mail obscene pamphlets under the law. The more you make him intelligent and with a good reputation, the worse you make his offense if you find this paper to be obscene. The literary man, the intelligent man, the graduates of colleges, have no license to mail obscene pictures.

So you will decide this case without any reference to the other prosecution; without any reference to the career of this man, literary or otherwise; without any reference to the delay by the district attorney, and without any reference to other publications which are worse. The only question for you is whether or not you are satisfied that this man mailed this paper, and then, judged by the test I have given you, whether it is an obscene paper. If it is, he ought to be convicted; if it is not, he ought to be acquitted.

As I said, I can intimate to you my opinion, but I do not. I leave it to you, and I prefer to allow twelve intelligent men to say whether that is an obscene paper, judged by the test, which I read once more: The test of obscenity is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences and into whose hands a publication of

this sort may fall. Apply that test to this paper and say
49 whether it is obscene. If you find it is obscene and believe his admission, that he mailed it, it is your duty to convict; if you find it is not obscene, it is your duty to acquit him.

I generally ask in cases of this kind—I do not think it necessary in this case—but I generally advise jurors not to carry the question too far in applying that test and make absurd conclusions. Minds differ upon such a question; but, like sensible men, you should determine what the tendency of the matter in the paper is.

Mr. CARPENTER: I would like to except to that portion of your honor's charge where you say that the more we show the good character or reputation of the man, the worse he appears. I ask you to instruct the opposite.

The COURT: I say, provided they they find he committed the crime.

Mr. CARPENTER: I have a right to introduce evidence of good character and the jury should weigh the evidence.

The COURT: I so say to the jury.

Mr. CARPENTER: And I would like your honor to instruct them as to reasonable doubt.

The COURT: I say, give the man the benefit of a reasonable doubt. There is no doubt about his mailing the matter. The doubt is as to the character of the matter mailed, and if you have a reasonable doubt on the question, give to him the benefit of it. I want no unreasonable application of the test I have given you.

Mr. CARPENTER: I ask your honor to instruct the jury that
50 if there is a reasonable doubt as to whether Mr. Rosen himself knew that the publication was obscene, they should acquit him.

The COURT: No; I do not give that.

Exception.

Mr. CARPENTER: I ask your honor to instruct the jury in accordance with the decision in the case of United States *vs.* Whittier, to the effect that, this paper being sent to a person who had no existence, in answer to a decoy letter, it is not a violation of the law.

The COURT: No; I charge the jury otherwise. It does not make any difference whether Edwards was Edwards or Comstock.

Exception.

Mr. CARPENTER: I will take an exception to each denial of my requests. I also except to your honor's charge in relation to the statement you made that all these things might have been suggested for the purpose of taking away the minds of the jury from the real matter in controversy. I had no such intention. I intended to argue fairly and honestly to them. I did not try to mislead them at all.

The jury retired and returned with a verdict of guilty.
51 The counsel for defendant thereupon moved for a new trial:

(1.) Upon exception duly taken by the defendant upon the trial herein.

(2.) On the ground that the verdict is against the evidence.

(3.) That the verdict is contrary to the law.

(4.) That the indictment herein is fatally defective in matters of substance.

The foregoing motion was thereupon denied on each of said grounds by the court, and the defendant duly excepted.

Counsel for the defendant thereupon moved the court to arrest judgment herein on the ground that the indictment upon which the defendant had been convicted was fatally defective for the reason, among others, that the items failed to state that the said defendant knew that the contents of the paper deposited in the mails *was* lewd, obscene, and lascivious.

This motion was thereupon denied by the court.

To said ruling the counsel for the defendant duly excepted.

The United States attorney thereupon moved for sentence.

Judge Benedict sentenced the prisoner to ——.

And forasmuch as none of said matters and exceptions so offered and made to the rulings and directions of said judge do ap-
52 pear upon the record of said case, therefore, upon the prayer of said defendant, by his counsel, the said judge has signed and sealed this bill of exceptions, *nunc pro tunc*, as of the 27th day of March, 1894.

(S'g'd) CHAS. L. BENEDICT.

It is consented that the foregoing be signed as the bill of exceptions in the case.

HENRY C. PLATT,
United States Attorney.
PHILLIP CARPENTER,
Attorney for Defendant.

53 [Endorsed:] U. S. circuit court. United States *vs.* Lew Rosen. Bill of exceptions. Philip Carpenter, attorneys for —, 38 Park row, New York city. Due service of a copy of within is hereby admitted. Dated —— —, 189–. To —— ——. (Filemark:) U. S. circuit court. Filed June 26, 1894. John A. Shields, clerk.

Notice of Entry.

Please to take notice that the within is a copy of —, this day duly entered and filed herein in the office of the clerk of — of New York.

Dated New York, ——, 189–.

HOADLY, LAUTERBACH & JOHNSON,
Attorneys for ——.

To —— ——.

54 At a stated term of the circuit court of the United States for the southern district of New York, held at the court-room in the post-office building, in the city of New York, on the 26th day of June, 1894.

Present: Hon. Charles L. Benedict, justice.

UNITED STATES
vs.
LEW ROSEN.

The defendant, Lew Rosen, having filed a bill of exceptions herein, and the same having been presented to the court for settlement, and it appearing to the court that it is necessary and proper, in the opinion of the presiding judge, that the original papers used upon the trial herein, to wit, the two certain copies of the publication called "Broadway," introduced into evidence in this case and designated as Exhibits No. 1 and Exhibit No. 2, respectively, should be inspected in the supreme court on a writ of error, now accordingly it is—

Ordered that the clerk of this court shall safely keep and preserve the exhibits aforesaid and transport the same to the clerk of the supreme court, to be by him kept and preserved, in connection with the transcript of the proceedings herein, and used upon the argument and *and* consideration of the writ of error herein by the supreme court, whenever that shall be.

(S'g'd) CHAS. L. BENEDICT.

55 [Endorsed:] Circuit court of the United States for the southern district of New York. United States *vs.* Lew Rosen. Order. U. S. circuit court. Filed June 26, 1894. John A. Shields, clerk. Philip Carpenter, solicitor for def't, 38 Park row.

56 Circuit Court of the United States for the Southern District of New York.

UNITED STATES
vs.
LEW ROSEN.

The said Lew Rosen, the defendant herein, on this 26th day of June, 1894, by Philip Carpenter, his attorney, makes the following assignment of errors in the record and proceedings in the above-entitled action:

I. The indictment upon which the said Lew Rosen was tried and convicted is fatally defective in that it fails to allege that the said defendant deposited an obscene, lewd, and lascivious paper with knowledge of its character as obscene, lewd, and lascivious.

II. There is not evidence upon which to convict the defendant, Lew Rosen, for the reason that the paper shown to have been deposited in the mail by him was not obscene, lewd, and lascivious, nor was it non-mailable matter, nor matter contravening in any respect the statutes of the United States.

III. There is no evidence upon which to hold the defendant, Lew Rosen, for the reason that the paper which he is charged with having placed in the mails and which is alleged to have been obscene, lewd, and lascivious was placed therein by the device or procurement of the plaintiff, The United States Government, or of some third person not this defendant, and for that reason does not
57 constitute an offense against the statute in that case made and provided.

IV. The court erred in refusing, under inspection, to allow the attorney for the defendant to read to the jury from the case of United States *vs.* Whittier, 5 Dillon, p. 35. The record in this respect is as follows, as appears in the settled bill of exceptions:

"During the summing up by Mr. Carpenter he commenced to read to the jury the opinion of Judge Dillon, stated in the Whittier case. The court declined to permit the opinion to be read, and the defendant excepted to the ruling."

V. The court erred in refusing to instruct the jury as requested, contained in the settled bill of exceptions, as follows:

"Mr. CARPENTER: I ask your honor to instruct the jury in accordance with the decision in the case of United States against Whittier, to the effect that this paper being sent to a person who had no existence, in answer to a decoy letter, it is not a violation of the law.

"The COURT: No; I charge the jury otherwise. It does not make any difference whether Edwards was Edwards or Comstock.

"Exception."

VI. The court erred in excluding the following evidence in the testimony of the witness Brooks:

"I heard Mr. Comstock's testimony on my trial last December.

"Q. Did you hear him then swear that you wrote the direction on the wrapper of the paper that was sent to George Edwards, Summit, New Jersey?

"Objected to as immaterial. Sustained. Exception."

VII. The court erred in instructing the jury with respect to the defendant as follows:

"The more you make him intelligent and with a good reputation the worse you make the offense, if you find this paper to be obscene. The literary man, the intelligent man, the graduates of col-
58 leges, have no license to mail obscene pictures."

To which exception was taken as follows:

"Mr. CARPENTER: I would like to except to that portion of your honor's charge where you say that the more we show a good character and reputation, the worse he appears. I ask you to instruct the opposite.

"The COURT: I say, provided they find he committed the crime."

VIII. The court erred in charging the jury, referring to the defendant:

"You do not know whether he will be punished at all, for I have the right to suspend sentence if I wish."

IX. The court erred in refusing, after being requested, as follows:

"Mr. CARPENTER: I ask your honor to instruct the jury that if there is a reasonable doubt as to whether Mr. Rosen himself knew that the publication was obscene, they should acquit him.

"The COURT: No; I do not give that.

"Exception."

X. The court erred in charging the jury as follows, as contained in the bill of exceptions:

"It is said that the paper has been stopped. I do not see how that can be considered by you. You don't consider when a man is tried for thieving that he has not stolen anything since he was tried. Whether he has stopped this paper may be proper to suggest to me if I am called to pass judgment, but not so you."

(S'g'd) PHILIP CARPENTER,
Solicitor for Defendant, Lew Rosen.

(S'g'd) WM. N. COHEN, *Of Counsel.*

59 [Endorsed:] Circuit court of the United States for the southern district of New York. United States *vs.* Lew Rosen. Assignment of errors. Phillip Carpenter, solicitor for defendant, 38 Park row, New York city. U. S. circuit court. Filed June 27, 1894. John A. Shields, clerk.

Notice of Entry.

Please to take notice that the within is a copy of—, this day duly entered and filed herein in the office of the clerk of — of New York.

Dated New York, —— —, 189–.

HOADLY, LAUTERBACH & JOHNSON,
Attorneys for ——.

To —— ——.

60 Circuit Court of the United States for the Southern District of New York.

UNITED STATES
vs.
LEW ROSEN.

Know all men by these presents that we, Louis Auerbach, residing at 75 East 80th St., in the city of New York, and Adolph Heilbrun, residing at 63 East 80th St., in the city of New York, are held and firmly bounden unto the United States in the sum of two hundred and fifty dollars, to be paid to the said United States; for the payment of which, well and truly to be made, we bind ourselves

and each of us, and our and each of our heirs, executors, and administrators, jointly and severally, firmly with these presents.

Sealed with our seals and dated the 27th day of June, 1894.

Whereas the above-named Lew Rosen has taken an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action or proceeding by the circuit court of the United States for the southern district of New York:

Now, therefore, the conditions of this obligation is such that if the above-named Lew Rosen shall prosecute said appeal to effect and endure all damages and costs if he fail to make said ap-
61 peal good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

(S'g'd) LOUIS AUERBACH.
(S'g'd) ADOLPH HEILBRUN.

Signed, sealed, taken, and acknowledged this 27th day of June, 1894, before me—

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

Louis Auerbach and Adolph Heilbrun, being duly sworn, each for himself deposes and says that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

(S'g'd) LOUIS AUERBACH.
(S'g'd) ADOLPH HEILBRUN.

Sworn to this 27th day of June, 1894, before me—

(S'g'd) JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

Approved.
(S'g'd) CH'S L. BENEDICT.

62 [Endorsed:] Circuit court of the United States for the southern district of New York. United States *vs.* Lew Rosen. Bond for costs of appeal. Philip Carpenter, solicitor for defendant, 38 Park row, New York city. U. S. circuit court. Filed June 27, 1894. John A. Shields, clerk.

Notice of Entry.

Please to take notice that the within is a copy of —, this day duly entered and filed herein in the office of the clerk of — of New York.

Dated New York, —— —, 189–.

HOADLY, LAUTERBACH & JOHNSON,
Attorneys for ——.

To —— ——.

63 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

Be it remembered that on this 27th day of June, in the year of our Lord one thousand eight hundred and ninety-four, before me, John A. Shields, clerk of the circuit court of the United States for the southern district of New York, personally came Lew Rosen, of the city of New York, and Adolph Heilbrun, of 63 E. 80th street, New York city, and severally acknowledged themselves to owe to the United States of America—that is to say, the said Lew Rosen in the sum of two thousand five hundred ($2,500) dollars, and the said Adolph Heilbrun in the sum of two thousand five hundred ($2,500) dollars, separately, to be levied and made of their respective goods and chattels, lands and tenements, to the use of the said United States if default should be made in the conditions following, to wit:

Whereas, on the 27th day of March, 1894, at a term of the circuit court of the United States, held in and for the southern district of New York, the above-named Lew Rosen was convicted on an indictment charging him with a violation of sec. 5431 of the Revised Statutes of the United States, and on the 27th day of June, 1894, the said court pronounced judgment and sentence against the above-named Lew Rosen; and

64 Whereas a writ of error from such judgment has been allowed to the supreme court, and a citation thereof signed and issued, and the said Lew Rosen having been allowed to give bail in the sum of two thousand five hundred ($2,500) dollars pending the determination of such writ of error:

Now, therefore, the condition of this recognizance is such that if upon the judgment of the supreme court upon said writ of error from the judgment of said circuit court as aforesaid the said Lew Rosen shall personally appear before said circuit court whenever and as soon as a judgment upon the mandate of the said supreme court shall be entered in said circuit court, and then and there surrender himself to the said marshal and abide the order of the said circuit and supreme courts, then this recognizance will be void; otherwise to remain in full force and virtue.

(S'g'd) ADOLPH HEILBRUN.
(S'g'd) LEW ROSEN.

Acknowledged before me the day and year first above written.

(S'g'd) HENRY I. THORNTON,
Notary Public, New York County.

65 SOUTHERN DISTRICT OF NEW YORK, ss:

Adolph Heilbrun, of No. 63 E. 80th street, New York city, *New York city*, deposes and says that he is worth the sum of five thousand dollars over and above all his just debts and liabilities.

(S'g'd) ADOLPH HEILBRUN.

Sworn to before me this 27th day of June, 1894.
(S'g'd) HENRY I. THORNTON,
Notary Public, New York County.

Within bond approved as to form, sufficiency of sureties, and amount.
New York, June 27, 1894.
(S'g'd) CHAS. L. BENEDICT.

66 [Endorsed:] Supreme court. Lew Rosen, plaintiff as in error, — United States, defendant as in error. Recognizance on appeal. Hoadly, Lauterbach & Johnson, attorneys for def't in error, 22 William street, New York city. U. S. circuit court. Filed June 27, 1894. John A. Shields, clerk.

Notice of Entry.

Please to take notice that the within is a copy of —, this day duly entered and filed herein in the office of the clerk of — of New York.
Dated New York, —— —, 189–.
HOADLY, LAUTERBACH & JOHNSON,
Attorneys for ——.
To —— ——.

67 At a stated term of the circuit court of the United States for the southern district of New York, held at the post-office building, in the city of New York, on the 29th day of June, 1894.
Present: Hon. Charles L. Benedict, justice.

THE UNITED STATES
vs.
LEW ROSEN.

The defendant, Lew Rosen, having been convicted in this court on the 27th day of March, 1894, of violating section 3893 of the United States Revised Statutes, and the said Lew Rosen coming up for sentence in this court on the 27th day of June, 1894, and this court having sentenced the said defendant to imprisonment at hard labor for the term of thirteen months, and to pay a fine of one dollar, and the said defendant having taken an appeal therefrom to the supreme court by writ of error, which was duly allowed by this court, and the said appeal having been perfected and allowed, and the said defendant having been admitted to bail, pending the determination of said appeal, in the sum of two thousand five hundred dollars, and having given a proper recognizance upon appeal, approved by this court and filed in the office of the clerk of this court—

68 It is ordered that execution of the sentence hereinbefore recited, imposed upon this defendant, be, and the same hereby is, stayed until the entry in this court of the order of affirmance of the judgment of this court, after consideration by the

supreme court or upon the dismissal or determination of the said appeal, and the marshal of the United States for the southern district of New York is hereby directed to release the defendant, Lew Rosen, from custody pending the determination of the appeal as aforesaid.

CHAS. L. BENEDICT.

(Endorsed:) Circuit court of the United States for the southern district of New York. United States ag'st Lew Rosen. Supersedeas. Philip Carpenter, solicitor for def't, 38 Park row, New York city. Filed June 29, 1894.

69 The United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 25th day of July, 1894, pursuant to a writ of error filed in the clerk's office of the circuit court of the southern district of New York, wherein Lew Rosen is plaintiff in error and you are defendant in error, to show cause, if any there be, why the conviction and sentence rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable *Hon.* Melville W. Fuller, — Justice of the Supreme Court of the United States, this 27th day of June, in the year of our Lord one thousand eight hundred and ninety-four.

CHAS. L. BENEDICT.

70 [Endorsed:] E. & A. B. 1252. Circuit court of the United States for the southern district of New York. Lew Rosen, plaintiff in error, *vs.* United States, defendant in error. Citation. Philip Carpenter, solicitor for plaintiff in error, 38 Park row, New York city. Due service of a copy of within is hereby admitted. Dated June 27, 1894. To —— ——. Henry C. Platt, U. S. attorney. 10 p'd. U. S. circuit court. Filed Jun- 27, 1894. John A. Shields, clerk.

Notice of Entry.

Please to take notice that the within is a copy of —, this day duly entered and filed herein in the office of the clerk of — of New York.

Dated New York, —— —, 189–.

HOADLY, LAUTERBACH & JOHNSON,
Attorneys for ——.

To —— ——.

Endorsed on cover: Case No. 15,651. S. New York C. C. U. S. Term No., 767. Lew Rosen, plaintiff in error, *vs.* The United States. Filed August 2d, 1894.

FILED.
APR 13 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

LEW ROSEN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. ~~767~~ 1424

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

LEW ROSEN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 767.

MOTION TO ADVANCE.

This is a writ of error to a judgment of the circuit court of the United States for the southern district of New York, entered June 27, 1894, sentencing the plaintiff in error to pay a fine of $1 and be imprisoned for thirteen months at hard labor in the Erie County Penitentiary for sending obscene matter through the mails in violation of section 3893 of the Revised Statutes. The plaintiff in error has been released on bail in the sum of $2,500 pending the decision of this court.

The Solicitor-General respectfully moves the court to advance this case on the docket, and set it down for hearing on such day during the next term as may be convenient to the court.

15534

Counsel for the plaintiff in error has been notified of this motion, and proof of service of notice is filed with the clerk of this court.

consents that it be granted

HOLMES CONRAD,
Solicitor-General.

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Office Supreme Court, U. S.
FILED.
OCT 25 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

October Term, 1895.

LEW ROSEN,

Plaintiff in Error,

against

THE UNITED STATES,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief of

WILLIAM N. COHEN,

For Plaintiff in Error.

Supreme Court of the United States,

OCTOBER TERM, 1895. No. 424.

LEW ROSEN,
Plaintiff in Error,

vs.

THE UNITED STATES,
Defendant in Error.

Brief for Plaintiff in Error.

Statement.

This is a writ of error and bill of exceptions by which it is sought to review the conviction in the Circuit Court of the United States for the Southern District of New York, of Lew Rosen, plaintiff in error, charged with a violation of Section 3893 of the Revised Statutes of the United States.

The plaintiff in error was indicted by the United States Grand Jury, sitting in the city of New York, for having deposited and caused to be deposited in the Post Office for the city of New York a certain alleged obscene, lewd and lascivious paper, and was arraigned on March 14, 1894, when the plea of "Not guilty" was entered by the defendant.

On March 26, 1894, the defendant was tried before Hon. CHARLES L. BENEDICT, Judge, and a jury, in the Circuit Court of the United States for the Southern District of New York, and found guilty.

Motions were made for a new trial and in arrest of judgment, which were denied. Whereupon, after judgment and sentence had been imposed upon the defendant, whereby he was condemned to be imprisoned for a period of thirteen (13) months at hard labor in the Erie (N. Y.) County Penitentiary and to pay a fine of one dollar, a writ of error was allowed by the trial Judge, which brings here for review the sufficiency of the indictment, and the correctness of the rulings of the Judge upon the trial, and in denying the motions made in arrest of judgment and for a new trial.

The indictment charges that the defendant, on April 24, 1893,

"at the southern district of New York and within the jurisdiction of this Court, did unlawfully, willfully and knowingly deposit and cause to be deposited in the post office of the city of New York, for mailing and delivery by the Post Office establishment of the United States, a certain obscene, lewd and lascivious paper; which said paper then and there, on the first page thereof, was entitled, 'Tenderloin Number, Broadway'; and on the same page were printed the words and figures following, that is to say: 'Volume II, number 27, trademark 1892; by Lew Rosen; New York, Saturday, April 15, 1893; ten cents a copy, $4.00 a year in advance'; and thereupon, on the same page is the picture of a cab, horse, driver, and the figure of a female, together (underneath the said picture) with the word 'tenderloineuse,' and the said paper consists of twelve pages, minute description of which, with the pictures therein and thereon, would be offensive to the court and improper to spread upon the records of the court, because of their obscene, lewd and indecent matters; and the said paper on the said twenty fourth day of April, in the year one thousand eight hundred and ninety-three, was enclosed in a wrapper and addressed as follows, that is to say: 'Mr. George Edwards, P. O. Box 510, Summit, N. J.,' against the peace of the United States, and their dignity,

and contrary to the statute of the United States in such case made and provided" (*fols.* 9, 10).

Upon this indictment, which the plaintiff in error contends is fatally defective in several particulars to be hereinafter discussed, the conviction was had, though there was *no proof that the defendant had mailed or caused to be mailed the* paper which was submitted to the jury for determination as to whether or not it was obscene, lewd and lascivious within the statute, and though the violation of the statute with which the defendant was charged, was induced by the decoy letter of United States officer; further, the trial Judge erred in rulings upon the evidence and in his charge in certain particulars—all of which will be considered specifically in the brief as raised in the original record under the following

ASSIGNMENT OF ERRORS:

I.—The indictment upon which the said Lew Rosen was tried and convicted is fatally defective in that it fails to allege that the said defendant deposited the obscene, lewd and lascivious paper with knowledge of its character as obscene, lewd and lascivious (*First Point, infra, pp.* 7-16).

II.—There is no evidence upon which to convict the defendant Lew Rosen, for the reason that the paper claimed to have been deposited in the mail by him was not obscene, lewd and lascivious, nor was it non-mailable matter, nor matter contravening in any respect the statutes of the United States (*Fourth Point, infra, pp.* 31-39).

III & V.—There is no evidence upon which to hold the defendant, Lew Rosen, for the reason that the paper which he is charged with having deposited in the mail, and which is alleged to have been ob-

scene, lewd and lascivious was placed therein by the advice or procurement of the plaintiff, the United States Government, or of some third person not this defendant, and for that reason does not constitute an offense against the statute in that case made and provided. The refusal of the Circuit Court to instruct the jury that as the newspaper, if any, was sent in response to a decoy letter, there could be no crime, was error, as noted in Assignment of Error V (*fol.* 57) (*Fifth Point*, *infra*, *pp.* 40–43).

VI.—The Court erred in excluding the following evidence and testimony of the witness Brooks:

"I heard Mr. Comstock's testimony on my trial "the last December."

"Q. Did you hear him then swear that you "wrote the direction on the wrapper of the paper "that was sent to George Edwards, Summit, New "Jersey?

"Objected to as immaterial; sus- "tained; exception." (*Eighth Point*, *infra*, *pp.* 49–50).

VIII.—The Court erred in charging the jury, referring to the defendant:

"You do not know whether he will be punished "at all, for I have the right to suspend sentence, if "I wish." (*Sixth Point*, *infra*, *pp.* 44–6.)

IX.—The Court erred in refusing to instruct the jury, after being requested, as follows:

"*Mr. Carpenter.*—I ask your Honor to "instruct the jury that if there is reasonable "doubt as to whether Mr. Rosen himself "knew that the publication was obscene "they shall acquit him.

"*The Court.*—No, I do not give that.

"Exception." (*Seventh Point*, *infra*, *pp.* 47–48).

ADDITIONAL ASSIGNMENT OF ERRORS.

I.—The indictment upon which the said Lew Rosen was tried and convicted, is fatally defective in that it fails to specify the particulars, if any, with respect to which the paper alleged to have been sent through the mails was obscene, lewd and lascivious (*Second Point, infra, pp.* 17-25).

II.—There is no evidence upon which to convict the defendant as there is absolutely no proof that Lew Rosen mailed or deposited, or caused to be mailed or deposited, the paper which he is charged in the indictment with having sent through the mails. (*Third Point, infra pp.* 26-30.)

III.—The proof established that the only parts of the paper which could have been objected to were blackened over at the time of the mailing. It was, therefore, impossible to commit a crime under § 3893 of the Revised Statutes, and as the paper was not "obscene, lewd or 'lascivious,'" there was no evidence upon which to convict the defendant, Lew Rosen (*Fourth Point, infra, pp.* 31-39).

IV.—The Court erred in instructing the jury as follows:

"If a man mails an obscene print, blackened over, and gives notice how to run the blacking off so as to disclose an obscene print, the print is obscene; for as soon as the blacking is rubbed off an obscene print is disclosed" (*Fourth Point, infra, pp.* 31-39).

V.—The Court erred in admitting in evidence a copy of a letter alleged to have been written by the witness Comstock under the name of Edwards to H. Q. Brooks, inasmuch as the counsel for the plaintiff below had not accounted for the original. To this admission in evidence exception was taken in the following language:

"*Mr. Carpenter.*—When this is offered in evidence, I want my objection on the record that it is incompetent and immaterial, and because the original has not been accounted for.

And on the further ground as follows:

"*Mr. Carpenter.*—Your Honor, it now appears that it was addressed to Mr. Brooks who has not been proved to be the business manager and we object to it on that further ground." (*Ninth Point infra, pp.* 51-52).

VI.—The Court erred in submitting to the jury the question whether the newspaper alleged to have been sent was obscene. That was a question for the Court. (*Tenth Point, infra pp.* 53–57.)

The correctness of these several propositions we shall now proceed to show under the following:

Argument.

FIRST POINT.—The indictment is fatally defective in that it fails to allege that the defendant had deposited an "obscene, lewd or lascivious" paper with knowledge of its character as "obscene, lewd or lascivious."

This point is raised by the First Assignment of error (*fol.* 56).

(1.) The indictment (*fol.* 10) charges that the defendant

"did unlawfully, wilfully and knowingly deposit and cause to be deposited in the post office of the city of New York, for mailing and delivery by the Post Office establishment of the United States, a certain obscene, lewd and lascivious paper; which said paper then and there, on the first page thereof, was entitled, 'Tenderloin Number, Broadway,' and on the same page were printed the words and figures following, that is to say: Volume II, No. 27; Trademark, 1892; by Lew Rosen; New York, Saturday, April 15, 1893; 10 cents a copy, $4 a year in advance;' and thereupon on the same page is the picture of a cab, horse, driver and the figure of a female together (underneath the said picture) with the word 'tenderloineuse,' and the said paper consists of twelve pages, minute description of which, with the pictures therein and thereon would be offensive to the court and improper to spread upon the records of the court, because of their obscene, lewd and indecent matters; and the said paper, on the said twenty-fourth day of April, in the year one thousand eight hundred and ninety-three, was enclosed in a wrapper and addressed as follows, that is to say: 'Mr. George Edwards, P. O. Box 510, Summit, N. J.,' against the peace of the United States and their dignity, and contrary to the Statute of the United States in such case made and provided."

(2.) There is in this indictment no charge that the defendant knew the paper claimed to have been

deposited in the mail to have been obscene, lewd and lascivious.

That this is necessary to the sufficiency of the indictment is clear under the authority of

United States vs. *Slenker*, 32 Fed. R., 691.

There the indictment charged in practically the same form as in the case at bar, the commission of an offence against Section 3893 of the Revised Statutes of the United States. The defendant was tried and convicted, but upon a motion in arrest of judgment, the judgment was stayed and the defendant discharged for the reasons as stated by Judge PAUL (p. 694) :

" The jury in this case having found a verdict of guilty, the defendant moves the Court in arrest of judgment, on the ground that it is not alleged in either count of the indictment that the defendant knew the writings, papers, publications, etc., charged to have been by her deposited in the mail, were of an obscene, lewd and lascivious character. She is charged in the indictment with unlawfully and knowingly depositing, and causing to be deposited, in the mail, for mailing and delivery, certain obscene, lewd and lascivious writings, papers, etc ; but there is no allegation that she knew the papers, writings, etc., to be lewd, etc.

The *scienter*, when necessary to be alleged in an indictment is matter of substance, and not of form, and its omission is not cured by Section 1025 of the Revised Statutes. The district attorney insists that as the indictment is in the language of the statute, it is sufficient. This is the general rule as to sufficiency in describing the offense ; but where something more is necessary, such as the allegation of guilty knowledge, then the language of the statute is not always sufficient. This was the case in *U. S.* vs. *Carll*, 105 United States, 611, where the indictment alleged, in the words of the statute, that the defendant feloniously, and with intent to defraud, did pass, utter, and publish a falsely made, forged,

counterfeited, and altered obligation of the United States, but did not allege that the defendant knew it to be false, forged, counterfeited and altered, it was held insufficient even after verdict. The supreme court saying: 'In an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute, unless the words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all elements necessary to constitute the offense to be punished.' * * * * *

The Court is of the opinion that the indictment does not set forth the offense with clearness and all necessary certainty, so as to apprise the accused of the crime with which she stands charged, and every ingredient of which the offense is composed is not accurately and clearly alleged. It is defective because it does not allege that the defendant knew that the writings, papers, etc., which she is charged with having deposited in the mail, for mailing and delivery, were of an obscene, lewd and lascivious character. This conclusion is clearly sustained by principle and precedent; and the motion in arrest of judgment must be sustained."

(3.) Nor is it any answer to the contention of the plaintiff in error that the indictment follows the language of the statute; for this Court, in the case of the *United States* vs. *Carll*, 105 U. S., 611, held that an indictment under section 5431, was bad although it alleged in the exact words of the statute that the defendant—

"feloniously and with intent to defraud the bank * * * did pass, utter and publish upon and to the said bank * * * a falsely made, forged, counterfeited and altered obligation and security of the United States; [which was set forth according to its tenor] against the peace and contrary to the form of the statute."

In its decision, this Court, through Mr. Justice GRAY, uses the language above quoted in the *Slenker* case (*supra*) saying in addition (p. 613):

"Knowledge that the instrument is forged and counterfeited is essential to make out the crime; and an uttering with intent to defraud, of an instrument in fact counterfeited but supposed by the defendant to be genuine, though within the words of the statute would not be within its meaning and object. This indictment by omitting the allegation contained in the indictment in *United States* vs. *Howell*, 11 Wall, 432, and in all approved precedents, that the defendant knew the instrument which he uttered to be false, forged and counterfeit, fails to charge him with any crime. The omission is of matter of substance and not a 'defect or imperfection in matter of form only' within the meaning of section 1025 of the Revised Statutes."

It is difficult to see how in the face of this decision it can be contended that knowledge of the character of the matter mailed is not essential to the crime.

If, as was held in the *Carll* case, the use of the strong language, "that the defendant *feloniously and with intent to defraud*, uttered" a spurious obligation, could not repair the failure to allege knowledge, *a fortiori* must the indictment in the case at bar be held fatally defective; for in addition to omitting all mention of knowledge of obscenity, it does not even allege a felonious or improper intent.

In the *Carll* case, as in the case at bar, the statute under which the indictment was had, contained no language requiring in terms, knowledge on the part of the defendant. In that case as in this, knowledge was of the essence of the crime.

The case is on all fours with the one at bar, and the logic and reason of the one must control the other.

(4.) Directly in point is the case of *Commonwealth* vs. *Boynton*, 12 Cush., 499, in which the Supreme Court of Massachusetts, speaking through Judge BIGELOW, says (p. 500):

"In the present indictment, the only distinct averment of knowledge on the part of defendant is, that he 'knowingly sold' corrupt and unwholesome meat. There is no averment that he knew the meat to be in a diseased and unhealthy state, or unfit for food at the time of the sale. The word 'knowingly' does not apply to, and qualify every act charged, essential to constitute the offence under the statute; strictly speaking and construing the language of the indictment according to the technical rules of pleading, it qualifies and gives significance only to the word sell; so that in substance and legal effect, the averment is only that the act of *sale* was done by the defendant knowingly. But there is no allegation of any knowledge by him, at the time the sale was made, of the condition of the meat. The whole allegation might, therefore, be true, and yet the defendant might be innocent of any offence. * * * * * The averment of knowledge does not extend to each part of the description of the offence, in which it is an essential element. The indictment is, therefore, fatally defective, because it does not describe in apt and technical terms, any criminal act for which the defendant can be held responsible or upon which any valid judgment can be rendered."

Here again the statute did not, in express terms, require knowledge on the part of the defendant of the impurity of the meat sold, and yet its statement was held essential to charge the crime.

(5.) In *United States* vs. *Bebout*, 28 Fed. R., 522, a case arising under this very section (3893 R. S.) it was held that knowledge of obscenity was essential to the crime.

(6.) In the *United States* vs. *Chase*, 27 Fed. Rep., 807, the Court held that an indictment under section 3893, was defective in that it did not allege that the defendant had knowledge of the obscene, lewd and lascivious character of the matter mailed; but regarded the defect as one of form and not of substance, and hence remedied by section 1025 of the

Revised Statutes. In this last respect it is, however, overruled by the *Carll* case (*supra*), which holds an omission of allegation of knowledge to be a defect of substance, not of form alone.

(7.) In the case of *United States* vs. *Dunbar* 60 Fed. R., 75 Judge BELLINGER, referring to some of the foregoing cases, says (p. 77):

"The indictments charged the defendants with having knowingly deposited in the mails certain obscene papers. This was held insufficient. A person may knowingly deposit a letter or paper in the mails without knowledge of its obscene character. The averments of such an indictment may therefore be true, and yet the defendant be innocent."

(8.) This Court, in *Pettibone* vs. *United States*, 148, U. S., 197, held fatally defective, an indictment under sections 5399 and 5440, R. S., for failing to state that defendant *knew* that justice was being administered in the Court with whose proceedings he interfered, or that the officer whom he was impeding in the discharge of his duty, was an officer of a United States Court. Inasmuch as sections 5399 and 5440, like section 3893, did not, in terms, require such knowledge, it will be seen that the decision has almost the force of a direct adjudicated precedent, with reference to the case in hand.

Chief Justice FULLER, in delivering the opinion of the Court cites numerous cases showing that *scienter* of the official character of the person interfered with was necessary, saying (pp. 206, 207):

"It seems clear that an indictment against a person for corruptly or by threats or force endeavoring to influence, intimidate or impede a witness or officer in a Court of the United States in the discharge of his duty, must charge knowledge or notice, or set out facts that show knowledge or notice on the part of the accused that the witness or officer was such. And the reason is no less strong for holding that a

person is not sufficiently charged with obstructing or impeding the due administration of justice in a Court unless it appears that he knew or had notice that justice was being administered in such Court.

* * * * * * *

It is insisted, however, that the evil intent is to be found not in the intent to violate the United States Statute, but in the intent to commit an unlawful act, in the doing of which justice was in fact obstructed, and that, therefore, the intent to proceed in the obstruction of justice must be supplied by a fiction of law. But the specific intent to violate the statute must exist to justify a conviction, and this being so, the doctrine that there may be a transfer of intent in regard to crimes flowing from a general malevolence has no applicability."

(9.) The disposition of the Federal Courts, Supreme, Circuit and District, to construe indictments strictly in favor of a defendant, especially with reference to the point of *scienter*, is shown by repeated decisions holding:

(*a.*) That an indictment in the language of § 5467, R. S., is bad for not stating the *intent*, or that the property alleged to have been taken belonged to a person other than defendant (*Jones* vs. *United States*, 27 Fed. R., 447).

(*b.*) That under § 5209, R. S., the misapplication of funds of a National Bank must be charged to be for the benefit of defendant, and with intent to injure and defraud. Failing this, the indictment is bad (*Britton* vs. *United States*, 107 U. S., 655; see also *Batchelor* vs. *United States*, 156 U. S., 426; and see § 5209, R. S.)

(*c.*) That an indictment for falsely personating another at an election (5511, R. S.), for representative, is bad for failing to state that defendant voted *for* such representative

(*Blitz* vs. *United States*, 153 U. S., 308; *United States* vs. *Seaman*, 23 Blatchford, 216).

On the general question of construing indictments we refer further to

Evans vs. *United States*, 153 U. S., 584, at p. 598.
United States vs. *Cook*, 17 Wall., 168, at p. 174.
United States vs. *Campbell*, 16 Fed. R., 233, at p. 235,

and the excellent rule for determining the sufficiency of indictments, as laid down in *Commonwealth* vs. *Young*, 15 Gratt., 664, 666, that:

"If the indictment may be true, and still the accused may not be guilty" of the offense described in the statute, "the indictment is insufficient."

Judged by this criterion, it is clear the indictment in the case at bar is insufficient. It may be true, *i. e.*, defendant may have "knowingly deposited" obscene matter, and yet not have known its obscene nature—which is essential to the crime.

(10.) It may be contended that the cases of *United States* vs. *Chase*, 27 Fed. Rep. 807; *United States* vs. *Clark*, 37 Fed. Rep., 106, and *United States* vs. *Nathan*, 61 Fed. Rep., 906, are adverse to the conclusions reached in the foregoing discussion, but they are not, as the following discussion shows:

(*a.*) In the *Chase* case Mr. Justice GRAY, sitting at Circuit, did not dispute the authority of those cases which hold an allegation of knowledge of the improper character of the matter to be essential to a good indictment even citing *Com.* vs. *Boynton* (*supra*), 12 Cush., 499, but held the defect to be one of form only, cured by § 1025 of the Revised

Statutes. This latter conclusion of the learned Justice is at variance with the *Carll* case (*supra*), 105 U. S., 611, and must be deemed overruled by it.

(*b.*) The *Nathan* case decided by Judge OLIVER P. SHIRAS, sitting as District Judge in the Eighth Circuit, confessedly follows the *Clark* case, which, having been previously decided by Mr. Justice BREWER, the then Circuit Judge of that Circuit, had the force of a binding authority upon the District Court.

(*c.*) In the *Clark* case the learned Justice was evidently misled by the illustration which he conceived to be a parallel case, saying (p. 107):

"A few simple illustrations will make this clear: I say that a party knowingly told a lie. Every one understands from that that the party has stated that which he knew to be a lie and not simply that he stated that which was in fact untrue, yet unknown to him to be true. And in the same way, when I say that a party knowingly deposited an obscene picture, no one supposes that I mean that he simply deposited a picture the character of which he was ignorant of."

To charge a person with knowingly telling a lie is redundant and equivalent to say that he knowingly told that which he *knew* to be false, for in the absence of knowledge of its falsity it would be merely a false or mistaken statement. It is impossible for a person to "lie" without knowing that the statements he makes are false. It is on the contrary a frequent occurrence for one to deposit a matter without knowing its contents.

Moreover this very argument admits the necessity of knowledge being alleged in the indictment in order to constitute the crime, and the further discussion of the Judge proceeds upon the theory that knowledge must at any rate be proven to sustain the indictment (italics ours), p. 107:

"Can it be possible that the defendant was misled by the language of this indictment as to the exact offense with which he was charged? *Did he for a moment suppose that he was charged with putting in the post office something of which he was entirely ignorant*, or did he understand from the ordinary meaning of the language used that he was charged with putting in the post office an obscene picture—that which he *knew* to be obscene?"

The conclusion of the Court, therefore, is in harmony with our contention that in order to commit the crime the defendant must have had knowledge of the obscene, lewd and lascivious character of the matter deposited; and since knowledge is necessary to the crime itself it must be alleged in the indictment, as stated in the *Carll* case, so that its

"Words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished."

It therefore follows that the indictment was fatally defective and the judgment of conviction should be reversed.

SECOND POINT.—The indictment upon which the said Lew Rosen was tried and convicted is fatally defective in that it fails to specify the particulars, if any, with respect to which the paper alleged to have been sent through the mails was obscene, lewd and lascivious.

This point arises under an exception to the refusal of the trial Judge (*fol.* 51) to rule

"that the indictment herein is fatally defective in matters of substance,"

and by number I of the additional assignment of errors.

The rules of criminal jurisprudence demand as the prime essential of a valid indictment, a statement therein with at least reasonable particularity, of the matters relied upon, to constitute the crime charged.

It is our contention that the disregard in this case, of this salutary doctrine cannot be excused by an allegation in the indictment that the matters constituting the very basis for the prosecution are omitted because they

"would be offensive to the Court, and improper to spread upon the records of the Court, because of their obscene, lewd and indecent matters" (*fol.* 10).

I.—The authorities in support of our position are numerous.

(1.) In criminal cases arising under the laws of the United States, a defendant is guaranteed by the Constitution of the United States itself, the right

"to be informed of the nature and cause of the accusation."

(Amendment VI, Constitution of the United States.)

The failure of the indictment in the case at bar to describe the matter alleged to be obscene was accordingly not alone a defect in law but in addition an unwarranted invasion of the defendant's Constitutional right.

(2.) The policy of this Court, requiring the charge against the defendant in a criminal case to be specific, was well exhibited in the case of *United States* vs. *Cruikshank*, 92 U. S., p. 558, in which Mr. Chief Justice WAITE, delivering the opinion of the Court, said:

"The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances.

It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him, and the Court must be able to decide whether the property taken was such as was the subject of larceny. * * *

The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defence by motion to quash, demurrer or plea; and the Court, that it may determine whether the facts will sustain the indictment. * * *

But it is needless to pursue the argument further. The conclusion is irresistible, that these counts are too vague and general. They lack the certainty and precision required by the established rules of criminal pleading. It follows that they are not good and sufficient in law."

(3.) In the case of

Regina vs. *Bradlaugh*, 3 Q. B. D., 621,

decided by the English Court of Appeal, this point was raised and received thorough consideration. In that case one Bradlaugh and a Mrs. Besant were indicted for obscene libel in publishing a book which the indictment described by its title only. It was held (reversing the judgment of the lower Court) that as the indictment failed to set out the particular words and portions of the book alleged to be obscene, it was fatally defective, either upon arrest of judgment or upon error.

In that case, Baron BRAMWELL, after citing numerous cases holding declarations in actions for libel or slander bad, if they failed to set out the very words complained of and after stating that this rule is applied with even more rigor to criminal than to civil cases, continues as follows, with reference to the point in hand (pp. 619, 620):

"That being the general principle, we must deal with the argument that obscene libels need not be, and indeed ought not to be set forth on the record; the reason given being that the records of the Court should not be defiled by any indecency of that kind. Speaking with the greatest respect to those who have thought otherwise, I think the objection fanciful and imaginary. The records of a Court of Justice are not read with a view to entertainment or amusement; and if the objection has any weight, why does it not apply to other libels and to other offences? I suppose the majority of mankind would think much worse of a blasphemous libel than even of an obscene libel, and would consider it much more objectionable that the terms of the former should be perpetuated than those of the latter. I suppose excellent reasons could be given why seditious language, possibly alluding disrespectfully to the Sovereign, should not be perpetuated on the Court rolls. But there is another kind of libel, which to my mind, if it were possible, ought to be effaced from the rolls, and yet it is admitted that

they must be set out on the record—I mean libels defaming the character of a private person. Let us see which is the worst in its consequences. Suppose a man indicted for a libel charging an infamous crime against another. It must be set out upon the record, for it is a defamatory libel. Then the defendant may never plead, or may not be arrested, or he may die and thus the charge may never be tried, and yet that statement is to remain on the record for all time, and no answer will be given to it. In some respects it would be well that such an imputation as that should be effaced from the records of the Court—an imputation so grievous to the individual and all connected with him. * * In support of this contention for the Crown, some American cases were cited. Decisions in the Courts of the United States are not binding authorities ; and although they may be expressly in point, yet if they are contrary to our law, they must be disregarded."

And again he says (p. 624):

"It may be a great inconvenience that a long libel should be put upon the record ; but whatever the inconvenience may be, it seems to me that upon an indictment for private defamation, blasphemy, obscenity, or sedition, where the objection is to the whole and not to a part, the whole must be set out."

The following observations of Mr. Justice BRETT, made in the course of the same case, have an important bearing in their application to the case at bar (p. 637, italics ours):

"It is said the defendants did print, publish, sell, and utter, a certain indecent, lewd, filthy and obscene libel, to wit, a certain indecent, lewd, filthy, bawdy and obscene book called the 'Fruits of Philosophy.' It is obvious that the title of the book, Fruits of Philosophy, was not enough to be relied on. Words cannot be more innocent—they never were or could be relied upon as the obscene libel charged. That which was to be relied upon *was something written in the book which was* so-called, and there is no description of anything con-

tained in that book. What is contained in that book is not even attempted to be described according to its tenor and effect. *There is a total omission of the contents, and yet it was the contents, or some part of the contents, which was to be relied on by the Crown.* The words complained of are necessary to the averment in the indictment, and the total omission of them cannot be cured by the verdict."

With regard to the defiling of the records of the Court, the same eminent Judge says (p. 638):

"I have read Lord Holt's view as expressed in *Rex* vs. *Sparling*, that the words of a blasphemous libel must be set out, however shocking they may be, and it seems to me, to say the least of it, a more robust rule to set out the obscene words upon the face of the indictment, than to attempt to preserve the purity of the records, when the ears of every one in Court must be polluted by the words being read out before the Judge and jury. I cannot follow the reasoning as to the advisability of the records of the Court being kept pure. It seems to me that it is a reason which does not bear examination, at all events, the principle that obscene words may be omitted if they are so obscene that they would pollute the records of the Court, is not the law of England."

Again our contention is explained and squarely upheld in the opinion of COTTON, L. J. (p. 640, italics ours).

"Does the law of England recognize, so as to make it available for the prosecution, that rule upon which the Judges in American Courts rely? It is perfectly true that the English Courts do require their records to be kept pure in this sense, that they will not allow their records to be the means of propagating defamation or obscenity under the pretence of its being part of a judicial proceeding. They will require anything impure or scandalous to be removed from their records when it is irrelevant to the matter to be tried, but if the *matters on the records of the Court or in an affida-*

vit, are really relevant to the matters to be tried, they are not scandalous, and no principle recognized by the English Courts requires any statement to be removed from their records, if relevant to the issue to be tried simply because it is impure. Does the principle that the records must be kept pure, justify the absence of what would otherwise be a necessary averment in the indictment, on the ground that it is gross and impure? In my opinion it does not, and for this reason the duty of the Court is to administer justice either as between party and party, or as between the Crown and those who are accused; and for the purpose of doing so, it ought not to consider its records as defiled by the introduction upon them of any matter which is necessary in order to enable the Court to do justice according to the rules laid down for its guidance; *a defendant has a right to say that he shall have fair notice in order that he may not be prejudiced in defending himself against proceedings, whether civil or criminal.*"

(4.) In *United States* vs. *Harmon*, 34 Fed. Rep., 872, there was an indictment for the very offense charged against defendant herein—sending obscene matter through the mails—and it was held fatally defective for not setting out the particulars in which a paper called "Lucifer" was alleged to be obscene, lewd and lascivious. Judge FOSTER, delivering the opinion of the Court, says (p. 873: italics ours.)

"How are the accused to know what particular paper, or what particular article of the paper is referred to in the indictment? *The accused are entitled to be informed of the specific charge made against them, and it must be sufficiently explicit and definite to enable them to prepare their defense, and present their evidence;* and further, to enable them in any future prosecution for the same offense to make the plea of *autre fois acquit* or *autre fois convict.* This indictment is clearly defective in this respect; nor can it be helped out by means of a bill of particulars. The offense charged is an infamous crime, under the decision of the supreme

ourt (*Mackin* vs. *United States*, 117 U. S., 348; 6 Sup. Ct. Rep., 777; *ex parte Wilson*, 114 U. S., 417; 5 Sup. Ct. Rep., 935), and the accused cannot be put upon trial except upon the presentment of a Grand Jury (Article 5, Amend. Const. U. S.), and all the essentials of the accusation must be presented by the grand jury in their indictment; and neither the court nor parties by consent can add to or take from the indictment (*ex parte Bain*, 121 U. S., 1, 7 Sup. Ct. Rep. 781). *It is not sufficient for the grand jury to allege that the contents of the paper are too obscene to be spread upon the records and omit every means of identification. Surely the objectionable matter can be described or identified in some way, without giving offense to the Court, or defiling its records with scandalous and indecent matter.*"

The doctrine of this case exactly fits the case at bar. In the paper here complained of, there were more than twenty pictures and several pages of reading matter and advertisements. The defendant surely was entitled to know exactly which of all these pictures and how many sentences were claimed to be obscene, lewd and lascivious.

If it were claimed that all were of that character the charge was not made out until all were shown to be of that character. The greater number of pictures and the reading matter and advertisements were, beyond dispute, clearly without the statute.

(5.) *United States* vs. *Clarke*, 40 F. R., 325, expressly approves of *U. S.* vs. *Harmon*, *supra*, but holds that as the defendant craved and obtained oyer of the paper upon which the indictment was based, several days before the trial, he was fully informed of the charge against him and a full description such as would otherwise have been required in the indictment, was unnecessary.

(6.) *Rex* vs. *Wilkes*, 4 Burr, 2527, was an indictment for obscene libel consisting in the publica-

tion of an "Essay on Woman." The objectionable words *were* set out; yet because they were introduced by the words "to the purport and effect following," instead of "to the tenor and effect following," the Attorney General, Sir Fletcher North, considered it unsafe to go on even after plea pleaded and issue joined, and thought it advisable to amend the record.

To the same effect see

Rex vs. *Sparling*, 1 Str., 497.

(7.) The cases are numerous which hold that in an action for slander or libel a declaration or complaint which fails to specify the words, articles or pictures, etc., alleged to be defamatory, is bad. *A fortiori* is this so when the same or similar matters are made bases for criminal prosecutions. We deem it unnecessary to cite more than the following cases:

Cook vs. *Cox*, 3 Maule & Selwyn, 110.
Rex vs. *Popplewell*, 2 Str., 686.
Rex vs. *Chaveney*, 2 Lord Raymond, 1368.
Zenobio vs. *Axtell*, 6 Term. Rep., 162.
Newton vs. *Stubbs*, 2 Show., 435.

II.—In some books vague references have been made to an "American doctrine" as distinguished from that of England, and as dispensing with the particularization of words or pictures characterized as obscene, if the indictment state that the matters are too indecent to be spread upon the Court records. We submit that the above array of authority in favor of our point is sufficient to dissipate all notion of the existence of such an alleged "American doctrine."

But even if it were admitted that the Courts of a few States differed in their views from what we

have seen to be the current of authority, we submit that every consideration of justice, policy and reason condemns a doctrine which deprives a defendant of a constitutional and invaluable right, because forsooth, a record filed away among the archives of the Court, whose first merit should be fullness and accuracy, must be kept clean.

Suppose that in the case at bar, some of the pictures alleged to have been obscene, had in addition constituted an actionable libel against some individual,—we apprehend that in a civil action for damages it would be conceded that the failure to specify the libellous picture or pictures in the complaint, would be fatal to a recovery; and yet if the objection of defiling the records would not avail against the *civil* liability of a defendant, with what show of reason can it be contended that it should be permitted to stand in the way of a fair trial for one accused of an act involving criminality, imprisonment, and disgrace?

To allow the pernicious doctrine against which we are contending, would be to leave to the whims of each grand jury the determination of what is too "obscene, lewd and lascivious," to defile Court records and would fit the indictment to whatever portion of a publication a jury should subsequently hold to be obscene, even though that particular portion had never been in the minds of the grand jury. Such flexibility of indictments is contrary to the history and spirit of our laws.

The doctrine itself, as to defiling Court records, applies only where an allegation is inserted in the indictment to the effect that such records would be contaminated by a description of the objectionable matters. The statement of the doctrine itself, therefore, is a confession that the description of the crime is insufficient but it is sought to justify it, under the statement above referred to. There is no magic in words, and an insufficient description of a crime cannot be cured by means of such a weak device.

THIRD POINT.—There is absolutely no evidence that Lew Rosen, mailed or deposited, or caused to be mailed or deposited, the paper which he is charged in the indictment with having deposited, or caused to be deposited, in the mail. The judgment of conviction was therefore unwarranted, and should be reversed.

This point arises under the settled bill of exceptions, where the point was made that "the verdict is against the evidence" and "contrary to the law," and an exception taken by defendant's counsel to the Court's ruling (*fol.* 51).

It is also included under the Third Assignment of error, reading as follows (*fol.* 57):

"III.—There is no evidence upon which to hold the defendant, Lew Rosen, for the reason that the paper which he is charged with having placed in the mails, and which is alleged to have been obscene, lewd and lascivious, was placed therein by the device or procurement of the plaintiff, the United States Government, or of some third person, not this defendant, and for that reason does not constitute an offense against the statute in that case made and provided,"

and under the additional Assignment of error, number II.

(1.) Unless there was proof beyond a reasonable doubt in the Court below that the defendant or his agent mailed the paper which is alleged to have been obscene, the verdict in that Court was clearly without evidence to sustain it, and the judgment of conviction based upon it should be reversed.

This results—

(*a.*) From the fact that the point most vital to the case of the prosecution under § 3893 of the Revised Statutes (if not the whole case itself), is to prove the mailing or depositing in the mail by the defendant or his agent, of the paper upon which this indictment is based; and

(*b.*) From the well-established proposition of law that the burden of proof is always upon a plaintiff, and in criminal cases the prosecution must, upon the preponderance of all the evidence, prove its case beyond a reasonable doubt.

Green vs. *State*, 97 Ala., 59, 64.
Parker vs. *State*, 35 N. E. R., 1105, 1108.
Nowlan vs. *State*, 25 S. W. R., 774.
Harris vs. *State*, 14 So. R., 538, 539.
Heath vs. *State*, 13 So. R., 689.
Forney vs. *State*, 98 Ala., 19, 21.
State vs. *Gullette*, 26 S. W. R., 354, 356.

(2.) That there was no such proof is evident from the charge of Judge BENEDICT, in which he says (*fol.* 44), (italics ours):

"The intent in this case is not the most material question here, because the defendant admits that he mailed the paper. He said he mailed this paper which is put in evidence, and that he intended to mail it. So you will find and assume that, according to his admission, he did it, because he says he did. *I stopped the entire proof because he* (the defendant) *says he mailed it.* The act of putting that paper in the mail is admitted by the defendant"

As will appear from many portions of the record (*fols.* 29, 36, 44, 45), the trial of the case by Judge BENEDICT proceeded upon the theory that the defendant had admitted the mailing or the depositing in the mail, which was so vital to the prosecution's case.

That the assumption of the Court, as above indicated, was entirely gratuitous, will become evident when it is stated that what was relied on by the Court as an admission is contained in the following conversation which occurred while the

witness Comstock was on the stand and which we quote from the record (*fol.* 26):

"That is the original letter, with the exception of the purple pencil marks on its face. It was addressed to H. Q. Brooks, business manager of Broadway, 8 Union Square, N. Y. City. I saw this defendant in reference to this paper."

"*Mr. Carpenter.*—I might say that there is no dispute whatever about the fact that this defendant caused to be mailed *this copy of this* LETTER to Mr. Geo. Edwards, who was really Mr. Anthony Comstock."

"*The Court.*—Then the mailing of *that paper* by the defendant to Geo. Edwards is admitted?"

"*Mr. Carpenter.*—The admission is to George Edwards, who was a fictitious person."

"*Mr. Mott.*—I offer *this paper* in evidence."

The only admission contained in the above conversation was the mailing of a *letter*. Indeed, on no other theory could the question of the Court be intelligible, for it is evident that the phrase "that paper" must apply to that referred to in Mr. Carpenter's alleged admission, that is, the letter.

This is borne out by the repeated use of the word "paper," to indicate a *letter* by persons other than the Judge in the Court below, and notably by the Government's main witness, Comstock, as when he said (*fol.* 35):

"The *paper* I have in my hand is a copy of a *letter* which I wrote and mailed on the 25th day of April, 1893" (italics ours).

And again, on the same page of the record (*fol.* 35):

"The original *letter* I mailed in an envolope and addressed to H. Q. Brooks, business manager Broadway, 8 Union Square, N. Y., and I made an exact copy of that *paper* at the time, and no one saw or knew its contents," etc.

There is no reference to the mailing of the newspaper "Broadway." To distort the above into an admission of the mailing of the newspaper upon which the indictment was based, especially when the mailing is the very act that the prosecution is bound to prove beyond a reasonable doubt, would be utterly subversive of all theories of criminal jurisprudence, and contrary to that just rule which resolves in favor of the defendant every reasonable doubt.

(3.) Furthermore, should the clear meaning of the word as shown by the context be ignored and it be conceded that the word "paper" is a generic term, and might include still among other things, "newspapers," taken most strongly against the defendant, the alleged admission was at least ambiguous and liable to misconstruction. It was, therefore, of little weight. (*R. R. Co.* vs. *Button*, 68 Ill., 409.) That being so, and the proof of mailing having been shown to be a *sine qua non* of the case of the prosecution, it is clear that there was no evidence of mailing, and the judgment of conviction rendered by the Court below should be reversed.

(4.) That confessions in general are to be received with great caution is made evident by the following authorities, among others:

Roscoe's Crim. Ev., p. 67 (8 Ed.).
United States vs. *Nott*, 1 McL., 499.
Law vs. *Merrills*, 6 Wend., 268, 277.
Manuscript Case, cited 1 Leach, 264 (N.).

As the alleged confession was the sole evidence upon which the prosecution relied to establish the mailing of the newspaper by defendant, it is obvious that it failed to make out its case.

(5.) Even regarded as an admission, and giving

the fullest scope to the conversation relied upon by Judge BENEDICT [Subd. (2), *supra*], it could not, as matter of law, avail the prosecution, as it was not made by *defendant himself*.

It was at most an admission by an attorney of something done by his client, and where that is tantamount to a confession of crime it cannot affect the rights of his client, unless made by express authorization of the latter.

Rex vs. *Downer*, 14 Cox Crim. Cas. Rep., 486.

See also

Roscoe's Crim. Evidence, p. 85 (8th Edition).

FOURTH POINT.—As the only matter complained of at trial—which alone can by the most prudish be regarded as obscene, lewd or lascivious—was blackened over at the time of the alleged mailing—the paper as sent, if at all, was not "obscene, lewd or lascivious" and hence there was no crime under § 3893 of the revised statutes and no evidence upon which to convict plaintiff in error.

The Judge's charge to the contrary was reversible error. There was further a fatal variance, inasmuch as the proof showed the mailing of a blackened copy, if any, while the indictment refers to a clean copy.

This point arises by virtue of an exception taken at the trial (*fol.* 28) and under the Second Assignment of error (*fol.* 56), and also under the additional assignment of errors, numbers III and IV. It also brings here for review the exceptions to the charge made by the Court below (*fol.* 45) and its establishment involves a fatal variance between the indictment and the proof.

I.—That as a matter of fact, the only matter alleged to be objectionable—for it was not even suggested that the *reading matter* was improper—in the newspaper *Broadway*, was blackened over was clearly shown at the trial below, and we apprehend, is undisputed (*fols.* 28, 33, 34, 37, 39 and 40).

II.—From the various definitions of obscenity, lewdness and lasciviousness, as contemplated in § 3893 of the Revised Statutes, it is to be gathered that the indecency referred to must be such as to offend chastity must present to the mind or view something which delicacy and purity forbid to be exposed, and must have a tendency to degrade and corrupt those whose minds are open to such im-

moral influences and into whose hands the publication may fall.

United States vs. *Harmon*, 45 Fed. Rep., 417.

Queen vs. *Hicklin*, L. R. 3 Q. B., 360, 371.

United States vs. *Slenker*, 32 Fed. Rep., 691.

United States vs. *Clarke*, 38 Fed. Rep., 732.

It is obvious that a paper completely blackened over is of such a character that, tested by any one or more of these definitions, it falls far short of answering the description of an "obscene, lewd or lascivious" publication under § 3893 of the Revised Statutes. Indeed, we challenge the production of any person, however susceptible, who could be corrupted by gazing upon a mere blackened sheet.

It is therefore evident that no crime was committed.

III.—But the Court charged the jury that

"If a man mails an obscene print blackened over and gives notice how to run the blacking off so as to disclose an obscene print, the print is obscene, for as soon as the blacking is rubbed off, an obscene print is disclosed" (*fol.* 45).

We contend that this charge constituted reversible error, and on the following grounds:

(1.) The language of the charge concedes that the printing becomes obscene only upon the blacking being removed. *But the condition of the paper at the time it is mailed or passes through the mails, is the only question to be considered under* § 3893 *of the Revised Statutes.*

(*a.*) The language of the statute itself bears out this position, viz. (italics ours):

"Any one who shall knowingly *deposit* * * * * non-mailable matter * * * * shall * * * * be fined" etc.,

thus showing that the punishment is for *depositing non-mailable matter*, and not matter which in the future may become such.

(*b.*) A hypothetical case may make more evident the soundness of our position.

An innocent letter is deposited for mailing. Immediately thereafter a new statute making non-mailable what was before mailable, goes into effect. We apprehend that the depositor of the letter would be fully protected in his action; indeed, any other conclusion would render the new statute *ex post facto* in its operation. The offence is the depositing.

(*c.*) The case of *United States* vs. *Grimm*, 45 Fed. Rep., 558, is in accord with the foregoing proposition. JUDGE THAYER, in delivering the opinion of the Court, uses the following language (p. 559):

"The offence consists in *depositing* * * * * * * * . The offence is evidently complete when a letter * * * * * *is deposited in the mail*, duly addressed to a certain person. *It is immaterial whether the information contained in the letter ever reaches the person addressed*"

It is therefore evident that the non-mailability must exist at the time of depositing the publication, if at all. As at that time the paper in the case at bar was unobjectionable, the ruling of the Court below must be erroneous.

(2.) The obscenity contemplated by § 3893 of the Revised Statutes must be such as to be apparent upon inspection or reading.

Thus this Court, in *Ex Parte Jackson*, 96 U. S., 727, speaking through Mr. Justice FIELD, said (pp. 735, 736), (Italics ours.):

"In many instances, those officers can *act upon their own inspection*, and from the nature of the case, must act without other proofs; as where * * * * * * the object is exposed, and shows unmistakably that it is prohibited, *as in the case of an obscene picture or print.* * * * * * * The evidence respecting them *is seen by everyone, and is in its nature conclusive.*"

Again, in *United States* vs. *Mathias*, 36 Fed. Rep., 892, Judge SIMONTON, delivering the opinion of the Court, held that a sealed letter was not within § 3893 of the Revised Statutes as unamended by the law of 1888, saying (p. 896):

"It will be seen that the matter declared unmailable is intended for or within reach of the public or a part of the public, *the character of which can be ascertained by inspection.* * * * So, also, it is forbidden to carry such matter in the mail or to deliver it. How can this prohibition be obeyed unless the matter is such as can be inspected, and upon inspection can be seen to be unmailable? * * * * Apply the above. A sealed letter is not a publication (citing authorities.) *Its character cannot be discovered on inspection except by breaking the seal, which a postmaster cannot do.* It is not intended for the public. * * * In my opinion, the evidence does not bring this case within the Section of the Revised Statutes. The jury will find the defendant not guilty."

(*a.*) It is unnecessary to call the attention of this Court to the direct bearing of these authorities upon the point under discussion.

The numerous cases holding the Statute (both before and after the ammendment of 1888) to be inapplicable to sealed letter communications accord with the spirit of the decision in *United States* vs.

Mathias (*supra*), as requiring some patent and visible obscenity.

United States vs. *Chase*, 135 U. S., 255.
United States vs. *Williams*, 3 Fed. R., 484.
United States vs. *Loftis*, 12 Fed. R., 671.
United States vs. *Comerford*, 25 Fed. R., 902.
United States vs. *Huggett*, 40 Fed. R., 636.
United States vs. *Clark*, 43 Fed. R., 574.
United States vs., *Durant*, 46 Fed. R., 753.
United States vs. *Wilson*, 58 Fed. R., 768.
United States, vs. *Warner*, 59 Fed. R., 355.
United States vs. *Jarvis*, 59 Fed. R., 357.

We maintain that the perseverance with which many courts (*see cases supra*) have, even since the amendment of 1888, upheld the "published writing" theory indicates the firmness with which the principle has taken root, that, save for special leglislation, it is an open and visible indecency which the statute contemplates.

But the case at bar is far stronger than any of the sealed letter cases; for in the latter group, the removal of the envelope disclosed a writing which in itself was characterized by obscenity and indecency. The case in hand, however, is one in which the removal of the wrapper lays bare to the view nothing more objectionable than a simple sheet of blackened paper. In the former group were obscene writings hidden from the public gaze. In

the present case we have a document which upon inspection is entirely innocent.

(3.) Though based upon sound morality, the Revised Statutes were not intended to convert the government post office into a watchman of the public morals. They do not forbid the *publication* of obscene matter, but are simply, the exercise of the legitimate power of a governmental institution to refuse to carry what Congress has declared obnoxious. Thus, even the most vulgar and degrading of writings are not within the purview of the statute, unless they pander to those particular species of moral degradation signified by the terms "lasciviousness," "lewdness" or "obscenity."

United States vs. *Males*, 51 Fed. Rep., 40.
United States vs. *Clarke*, 43 Fed. Rep., 574.
United States vs. *Wightman*, 29 Fed. Rep., 636.
United States vs. *Durant*, 46 Fed. R., 753.

From the above cases it is evident that the statute under which the plaintiff in error was indicted, tried and convicted, is to receive a strict construction and that every doubtful case is to be excluded from its provisions.

That the plaintiff in error may safely invoke this doctrine of leniency will appear from the decision in *United States* vs. *Whittier*, 5 Dillon, 35, 39, in which JUDGE DILLON lays down the rule that

"Statutes creating crimes will not be extended by judicial interpretation to cases not plainly and unmistakably within their terms. * * * If there is a fair doubt whether the act charged in the indictment is embraced in the criminal prohibition, the doubt is to be resolved in favor of the accused."

This tribunal, speaking through Chief-Justice MARSHALL, said, in *United States* vs. *Wiltberger*, 5 Wheaton, 76, at p. 95, that

"The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not the judicial department. It is the Legislature, not the Court, which is to define a crime, and ordain its punishment."

This rule has been repeatedly followed:

United States vs. *Morris*, 14 Peters, 464, at p. 475.
United States vs. *Sheldon*, 2 Wheaton, 119, at p. 121.
United States vs. *Clayton*, 2 Dillon, 219.
United States vs. *Wilson*, 58 Fed. Rep., 768, at p. 771.

(4.) The newspaper which is the basis for this indictment became obscene, if at all, entirely as the result of an act of a party unconnected with the defendant. Indeed, the trial Judge, in its charge (*fol.* 45), conceded that the obscenity was brought into evidence only when this third person removed the covering.

It can require no argument to convince this Court that the plaintiff in error is not to be held responsible for the act of another. Moreover, the charge of the Court below that

"if a man mails an obscene print blackened over, and gives notice how to run the blacking off * * * the print is obscene,"

erroneously conveyed the idea that the defendant

of his own volition gave the directions for removing the lampblack. The proof, however, shows that Comstock, the main witness for the Government, complained of the blacking, and that it was only in answer to his strongly worded complaint that the alleged directions were given, if at all.

To contend that the newspaper herein contravened the Revised Statutes is no less absurd than to hold that one who sends through the mails a letter of untarnished purity, which is, by the evil mind of its recipient perverted into an immoral sense foreign to the mind of the writer, is guilty of a crime. And yet the two cases are entirely analogous for in each it is the act of another party that creates obscenity not present before, and in each the paper was unobjectionable during its whole course through the mails.

Another parallel case would be the mailing of two separate pieces of paper, each unexceptionable in itself, and the sending of a subsequent letter informing the recipient that a combination of the two will produce an indecent result. Certainly the subsequent letter cannot alter the character of the original papers. Indeed this is but a corollary of the proposition we have already established that the character of the matter at the time of mailing determines whether a crime against § 3893 has been committed.

(5.) That portion of the charge (*fol.* 45) in the Court below which proceeds upon the theory that the defendant had agreed to stand by the clean, as distinguished from the blackened copy, was utterly without foundation.

All that transpired with reference thereto is contained in *fol.* 29 of the record, and was simply an offer of the clean paper in evidence by the defenddant's attorney. It is plain that this is in no wise tantamount to the admission contended for by Judge BENEDICT. Indeed, it is much more easily open to

the opposite construction that it was put in evidence to show the wide contrast between it and the blackened copy which was sent. At any rate, the inference is not permissible that the clean paper was admitted to be the one by which the defendant was to be judged.

FIFTH POINT.—As the paper which is alleged to have been mailed was sent in response to a decoy letter, there was no crime under § 3893 of the Revised Statutes.

This point arises under the Third, Fourth and Fifth Assignments of Error (*fols.* 56, 57).

(1.) The act with which defendant is charged was the result of a decoy letter, and hence there was no crime committed.

(*a.*) The testimony shows, and it is not disputed, that the violation here alleged consisted in sending to a fictitious person, George Edwards, at Summit, New Jersey, a copy of a newspaper, at the request contained in the letter supposed to have been written by said Edwards.

(*b.*) It further appears that this Edwards was no other than one Anthony Comstock, a United States Mail Inspector, who adopted this means to entrap the defendant into a violation of the United States laws.

(*c.*) The case of *United States* vs. *Whittier*, 5 Dillon, 35, is directly in point, and the refusal of the Court to permit Counsel to read from it to the jury (*fol.* 57), or to charge in accordance with it (*fol.* 57), constitutes reversible error.

JUDGE DILLON there uses the following language:

"I place my judgment in this case upon the single ground that the sealed letter written by the defendant, addressed to a person who had no existence, and which *on its face gave no information of the prohibited character*, and which is brought within the statute only by the fictitious letter of inquiry written by a detective, is not the 'giving of information' within the meaning of the statute. At all events, it is not certain that Congress intended to punish such an act; and, therefore,

upon the principle above mentioned, that criminal statutes are not to be extended by judicial construction to cases not clearly and unmistakably within their terms, my judgment is that this prosecution, on the admitted facts, cannot be sustained. It is a case of clear moral guilt, but not of legal criminality. There is no legal crime committed, although the defendant did not know of the fact which deprived his act of its criminal quality (1 Bish. Crim. Law (5th Ed.), Sec. 262)."

(*d.*) It has repeatedly been held that when letters were taken from the mail as the result of a decoy, there could be no infringement of § 3891 or § 5467 of the Revised Statutes.

United States vs. *Denicke*, 35 Fed. Rep., 407.
United States vs. *Rapp*, 30 Fed. Rep., 818.
United States vs. *Matthews*, 35 Fed. Rep., 890.

(*e.*) But the case at bar is far stronger for the defendant than was any of the cases just cited. In those cases the crime, if any, was larceny from the mail by employes of the U. S. Post Office.

In such cases the use of a decoy may be excused on the plea that it is a necessary practice for the protection of a gigantic governmental institution; that it is a means used by an employer to confirm well-grounded suspicions as to the honesty of its subordinates in matters interwoven with the welfare of the whole nation; that its object is to secure and protect property for which the government is responsible, and not merely to bring about the imprisonment of a wretched victim of an abominable practice; that it is not a solicitation to crime under cover of false circumstances, but merely a means to detect a voluntarily committed crime and to use as evidence of repeated acts of a similar nature; that it is in a vast majority of cases the only way to detect an accused person since it is a crime

which, if committed at all, is done under the most secret conditions.

But when it comes to cases of mailing obscene matter, such as the case at bar, the circumstances are vastly different. To employ a decoy letter in such a case can be excused on none of the pleas above advanced. Its sole object is at one and the same time to procure the commission of a crime and to prosecute the unfortunate victim. It is an invitation to do a criminal act where no thought thereof may previously have existed. It is unnecessary for the detection of crime, for the obscenity essential thereto is invariably of a patent and visible sort, and, indeed, were it otherwise, could not constitute an infraction of § 3893 (see Point Fourth, Subd. III (2), *supra*). It is, in short, not attended by any of the palliating circumstances present in the case of larceny from the mails.

(*f.*) That the distinctions above stated are correct is attested by the opinion of Judge BROWN in the case of *United States* vs. *Wright*, 38 Fed. Rep., 108, at p. 109 (italics ours):

"On principle there is a clear distinction between artifices used to *detect* persons suspected of being engaged in criminal practices and means *used to tempt them to* ADOPT such practices. Thus, it would be clearly improper to put counterfeit money in the hands of a suspected person, that another may go and induce him to pass it or sell it in order to lay the foundation of a complaint; but it has never been doubted that a detective may purchase counterfeit money of a suspected person for the purpose of ascertaining whether he has it in possession."

See also *People* vs. *McCord*, 76 Mich., 200.
Reg. vs. *Johnson*, 1 Car. & M., 218.
Speiden vs. *The State*, 3 Tex. App., 156.

(*g.*) The truth of the above statements is borne out by the fact that rarely, if ever, has a conviction

under §3893 been secured upon decoy evidence. As § 3893 is not aimed against the publication of obscene matters but is concerned only with their conveyance through the United States mails, it is evident that the sending for the first time of such publication through the mails in response to a decoy letter makes a criminal of one who would not otherwise have offended. We contend, therefore, that as a matter of law he cannot be guilty of a crime unless proof be given that other obscene publications of the same sort were sent through the mails voluntarily and without the under-hand solicitations of government spies.

In the case at bar not one iota of evidence was given showing that any copy of the paper had ever been mailed besides the one upon which this indictment was based.

It, therefore, follows that as matter of law the conviction of the defendant was error.

(2.) There is another legal objection to conviction obtained under this section of the Revised Statutes by means of decoy letters. It has been seen that "obscene, lewd or lascivious" matter, within the purview of the statute, signifies "matter which would deprave the minds of those into whose hands it might fall." (See Fourth Point, Subd. II, *supra.*)

Where the matter is sent in answer to a decoy it is to be used only for evidential purposes, and hence there is no one "into whose hands it can fall" except the post office inspector.

In the absence of proof, therefore, that the morals of this individual were depraved by the matter sent, it was not obscene and hence not within the statute.

For the above reasons, we believe that from whatever standpoint regarded, whether as matter of reason, justice or public policy, a conviction obtained under § 3893 of the Revised Statutes as the result of decoy letters cannot stand.

SIXTH POINT.—The Court erred in charging the jury, referring to the defendant, "You do not know whether he will be punished at all for I have the right to suspend sentence if I wish."

This point is raised by the Eighth Assignment of error (*fol.* 58).

That this charge was gross error we shall endeavor to establish upon the following grounds:

I.—The Circuit Court had no power to suspend sentence indefinitely after conviction.

(1.) No United States Statute ever gave it such power.

(2.) But even at common law, the exercise of such a power was frequently denied as vesting the judiciary with a pardoning power (see cases *infra*).

The strength of this objection in a *United States* Court however can hardly be over-estimated when it is remembered that the underlying feature of the Federal Constitution is the complete separation of the legislative, executive and judicial departments of the government from one another.

(3.) In *United States* vs. *Wilson*, 46 Federal Rep., 748, the Circuit Court, speaking through Judge BEATTY, says:

"In this cause, however, the record does not show that the suspension was for any such reason, or for a certain or short time, but, on the contrary, it appears it was for such uncertain time as the defendant should continue to remain so favorably impressed with the laws of the land as to obey them. Instead of this being a mere suspension of sentence, it operated as a condonation of the offense, and an exercise of a pardoning power which was never conferred upon the Court. In this I think the Court clearly transcended its authority."

Other authorities directly in point are :

People vs. *Brown*, 54 Mich., 15, 27, 28.
People vs. *Blackburn*, 23 Pacific Rep., 759, 760.
People vs. *Riley*, 53 Mich., 262.
People vs. *Morrisette*, 20 How. Prac., 118.
People vs. *Court of Sessions*, 46 N. Y. State Rep., 255.
People vs. *Court of Sessions*, 66 Hun, 550.

(4.) In the case of the *People* vs. *The Court of Sessions*, 141 N. Y., 288, while the real point of adjudication was the constitutionality of a certain Act, it is true that some *dicta* favor a limited suspension of sentence. But as to allowing an *absolute suspension* such as referred to in Judge BENEDICT's charge, the Court uses the following strong language :

"The *power to suspend the judgment* during good behavior, if understood as expressing a condition, *upon the compliance with which the offender would be absolutely relieved from all punishment and freed from the power of the court to pass sentence*, is open to more doubt. The legislature cannot authorize the courts to abdicate their own powers and duties or to tie their own hands in such a way that after sentence has been suspended they cannot, when deemed proper, and in the interest of justice, inflict the proper punishment in the exercise of a sound discretion. Nor can the free and untrammeled exercise of this power or the right to pass sentence according to the discretion of the court be made dependent upon compliance with somecondition that would require the court to try a question of fact before it could render the judgment which the law prescribed. The statute must not be understood as conferring any new power. *The court may suspend sentence as before, but it can do nothing to preclude itself or its successor from passing the proper sentence whenever such a course appears to be proper*" (italics ours).

As matter of authority, therefore, the charge of the Court was clearly erroneous, and as it led the jury to believe that their verdict was comparatively immaterial, as the Court would still retain a quasi-pardoning power, its prejudicial tendency against the defendant is manifest.

II.—More fully set out, that portion of the charge, to which it relates, is as follows (*fol.* 44):

"It has been said that the punishment is enormous. Whether it shall be five years or one day is not the question put to you. I shall not ask you that. I have to decide that. Do not decide this case on the theory that you can say how much punishment this man can have, if convicted. You do not any of you know that. You do not know whether he will be punished at all, for I have the right to suspend sentence if I wish."

This charge led the jury to believe that the Court could make the punishment nothing or the full limit of the statute and took from them even their right to recommend the defendant to the mercy of the Court; and as this privilege is of unquestionable value to a defendant in every criminal case, it is plain that the charge of the Court was marked error, and constitutes ground for the reversal of the judgment of conviction.

SEVENTH POINT.—The Court erred in refusing, after being requested to charge, as follows:

"Mr. Carpenter.—I ask Your Honor to instruct the jury that if there is a reasonable doubt as to whether Mr. Rosen himself knew that the publication was obscene, they should acquit him.

"The Court.—No, I do not give that.

"Exception."

This point arises under the Ninth Assignment of error (*fol.* 58), and under the bill of exceptions (*fol.* 50).

I.—This refusal of the Court so to charge (*fol.* 50) was erroneous. That knowledge on the part of the defendant, of the obscene character of the matter deposited, is essential to the commission of a crime under § 3893, results:

(1.) From the fact that the indictment is fatally defective for failing to allege such knowledge (see First Point, *supra*).

(2.) From the decisions cited, among them:

United States vs. *Slenker*, 32 Fed. Rep., 691.

United States vs. *Bebout*, 28 Fed. Rep., 522.

17 Amer. & Eng. Ency. of Law, p. 11.

(3.) From numerous cases in which the word "knowingly" in various statutes has been held to mean guilty knowledge, even though the language of the statute itself omitted his requirement. In other words, in order to constitute a crime, even where the *statutes* do not explicitly so require, the Courts are practically unanimous in holding that the accused is not guilty unless he *knew* of every element which was necessary to constitute the crime.

Pier vs. *Hanmore*, 86 N. Y., 95.

Sullivan Co. vs. *Grafton Co.*, 55 N. H., 339.

Cliquot's Champagne, 3 Wall., 114.
Byrne vs. *State*, 12 Wisc., 519, 527.
State vs. *Davis*, 14 R. I., 281.
Driskill vs. *Parrish*, 3 McLean, 631, 636.
Gillner vs. *Gorham*, 4 McLean, 402.

(4.) From the fact that in no case of the many, which have arisen under § 3893, has it been disputed that *scienter* is a vital element in the crime, the only controversy having been as to whether the words "*knowingly deposited*," used in an indictment, are equivalent to a statement that the defendant deposited matter, *which he knew to be obscene.*

(5.) From the fact that if *scienter* were not essential, everybody, who in any way contributes to the depositing of matter in the mail, would subject himself to enormous criminal liability, if it should transpire, that the letter which he mailed was obscene, even though he was entirely ignorant of its authorship and contents. It is too obvious from the object of the statute, from the reason of the thing, and from every other intelligent point of view, that such never was the intention of Congress.

(6.) Further, this request to charge was manifestly intended to repair the error of the Court at *folio* 29, where the trial Judge said:

"If he mailed the paper, as he admits he did, *he committed the crime if the jury find what he mailed was obscene.*"

—to which defendant excepted inasmuch as it took from the consideration of the jury the element of defendant's knowledge of the obscenity.

EIGHTH POINT.—The Court erred in excluding the following evidence in the testimony of the witness Brooks:

"I heard Mr. Comstock's testimony on my trial last December.

Q. Did you hear him then swear that you wrote the direction on the wrapper of the paper that was sent to George Edwards, Summit, New Jersey?

Objected to as immaterial; sustained; exception" (*fol.* 41).

This point arises under the sixth assignment of error (*fol.* 57), and under the bill of exceptions (*fol.* 40).

I.—This exclusion of evidence by the Court materially and unjustifiably injured defendant's case. That the question was far from immaterial is shown by the following testimony given by the witness Comstock (*fol.* 27):

"I testified on the previous trial of this same offense against Mr. Brooks, the business manager of Mr. Rosen.

I did not swear that the wrapper which enclosed this paper which is put in evidence, was in the handwriting of Mr. Brooks. I testified, Mr. Brooks stated that it was his handwriting. It was proved upon the trial that it was written by Mr. Seymour."

II.—The object of seeking the admission of the rejected evidence was thus to impeach either the veracity or memory of Comstock or both. That this is legal is too well established to be open to question.

As, in this case, Comstock was the chief if not the only witness of the United States, it will be seen how vital it was to the defendant to contradict Comstock's testimony, or to show to the jury the unreliable and weak character of the prosecution's chief witness.

III.—It was Comstock who swore that Rosen had said (*fol.* 37) that he was responsible for Brooks, and upon his testimony to that effect the letters written by and to him, under the alias of Edwards, were admitted in evidence, and the only thing that connects the defendant with them is the testimony of this witness whose veracity it was not permitted to the defendant to impeach.

NINTH POINT.—It was error to admit in evidence a copy of a letter alleged to have been written by the witness Comstock under the name of Edwards, to H. Q. Brooks, inasmuch as the counsel for the plaintiff below had not accounted for the original, and for other reasons.

This point arises under the settled bill of exceptions by virtue of exceptions duly taken (*fols.* 35, 36, 37, 38)., and under the additional assignment of error, number V.

(1.) It is too well settled to require citation of authority; that a copy of any written document, or indeed any evidence of a secondary or inferior nature, is inadmissible unless the original has been accounted for and valid reason has been shown for its non-production, such as that it was lost, burned or otherwise destroyed, or in the possession of the opposite party, etc.

Among the numerous cases sustaining this contention are

Sebree vs. *Dorr*, 9 Wheat., 558, 561.
Simpson vs. *Dall*, 3 Wall., 460, at 475.
Savage vs. *D' Wolf*, 1 Blatch., 343, 345.
Meek vs. *Spencer*, 8 Indiana Reps., 118, 119.
Morgan's Best on Evidence, Vol. 2, p. 795.
Greenleaf on Evidence, § 558.

(2.) But, while in ordinary cases, the objection just alluded to is fatal to any attempt to admit in evidence a copy of any written document, it possesses an additional and peculiar strength in the case at bar, for it was elicited at the trial that it was not even an exact copy of the original. This is borne out by the testimony of Arthur T. Seymour at the trial below (fol. 38):

"But, if I remember rightly, Mr. Comstock has not produced an exact copy of that letter, for I now remember that he said near the end to send this paper to him for six months and he would send us $2. on receipt of bill, and if at the end of that time we heard no more from him to continue."

(3.) There was an aditional objection to admitting in evidence the copy above referred to, viz., that it was not addressed to this defendant, but was addressed to one Brooks who, at the time it was offered in evidence, had not been proved to be the business manager of the defendant, Lew Rosen. It was, therefore, at that time, entirely irrelevant and should have been excluded.

(4.) As this letter and the correspondence incident thereto had a most important bearing upon the outcome of the trial in the Court below, it is evident that the improper admission of an important document constitutes error for which the judgment of conviction below should be reversed.

TENTH POINT.—The Court erred in leaving to the jury the question whether the newspaper alleged to have been sent was obscene. That question is one of law, to be decided by the Judge.

This point arises under the sixth additional assignment of error and under the exception duly taken (*fol.* 51) "that the verdict is contrary to the law."

I —The vital importance of this point in the case at bar will at once be manifest when it is recalled that the question of obscenity was the only one submitted to the jury, the Court taking extraordinary pains to withdraw every other matter from their consideration. We quote from the charge of the Court below (*fols.* 44, 45):

"All you have to do is to answer the question I will put to you, and on your answer I will give the judgment which the law requires. * * * But the mailing of everything is not against the law; only the mailing of obscene paper is against this law. He does not admit that the paper he mailed is obscene. *The Government must therefore prove that it is obscene, and that is the question of fact I put before you.* * * * *Whether it is obscene or not is the material question of fact you are to decide.*"

We would, therefore, respectfully call the particular attention of this Court to this point.

II.—That the question of obscenity was one for the Court and not for the jury is amply sustained.

(1.) Upon this point the crime under § 3893 is assimilated to the common law offence of "obscene libel." In cases of libel the vast weight of authority, particularly in the United States, holds that it is a matter for the Court and not for the jury

to determine whether the written or printed paper is libellous.

More vs. *Bennett*, 48 N. Y., 472.
Hunt vs. *Bennett*, 19 N. Y., 173.
Green vs. *Telfair*, 20 Barb., 11.
Matthews vs. *Beach*, 5 Sandford 256.
Snyder vs. *Andrews*, 6 Barb., 43.
Woodruff vs. *Bradstreet Co.*, 116 N. Y., 217.
Tuson vs. *Evans*, 12 Adolph & Ellis, 733.
Levi vs. *Milne*, 4 Bing, 195.
Odger's Libel and Slander, p. *94, note (*a*) and cases there cited.

The analogy between cases of libel and those under § 3893 is, as to this point, most obvious. Repeated and clear definitions of libel have emanated from various Courts; so also the meaning of the words "obscene," "lewd and lascivious" under § 3893 is no longer open to doubt (see *Point Four Subd.* II, *supra*). In both cases therefore it is simply a matter of determining whether the paper upon which an indictment is based satisfies a well defined criterion. If in cases of libel that is held to be a matter of law, it is, to say the least, difficult to unearth a reason why the same process applied to an indictment for sending obscene publications through the mails, should be regarded as matter of fact.

(2.) As the construction of written or printed instruments is peculiarly the province of the Court as distinguished from the jury, it follows that it was for the Judge and not the jury in the case at bar, to determine whether the newspaper "Broadway" satisfied the legal interpretation accorded the words "obscene, lewd and lascivious."

Greenleaf on Evidence, § 277.
Globe Works vs. Wright, 106 Mass., 214.
Myers vs. *Sarl*, 3 Ellis & Ellis, 306.

Hamilton vs. *Liverpool Ins. Co.*, 136 U. S., 242, 255.
Young vs. *Jeffrys*, 4 D. & B., 216.
Spragins vs. *White*, 108 North Carolina, 192.

(3.) The very theory of the law in bringing about the separation of functions of Judge and jury requires that the determination of the character of the publication objected to should be for the Court.

That ancient rule which declared and still declares the construction of written or printed instruments to be the province of the Court had its inception in considerations of expediency. It was intended to give a settled meaning to words of which the interpretation would otherwise have varied with the different complexion of every jury, and to remove from the domain of uncertainty matters as to which it was eminently proper that sound judicial precedents should be established. Surely the force of these reasons demands their application to the case at bar; for, if there is any one subject upon which men will differ according to their education and surroundings it is upon the determination of what is or is not "obscene," "lewd" or "lascivious." It cannot be, that where imprisonment and disgrace are involved, the dictates of a sober justice can be content to abide by a verdict which will be for or against the accused according to the peculiar, views of that particular jury. The Apollo Belvidere and Venus di Medici are condemned as unfit for the public gaze by one, while his classical neighbor can conceive of no place too conspicious for their exhibition. A countryman's view of what is "correct" differs radically from the view of the inhabitant of the city; so, too, the view of a resident of the "Blue-Law" cities of Connecticut on the same subject would differ materially from that of a Parisian.

Surely then, cases like the one at bar should be submitted *to the Court* and *not* to the *jury* to decide upon their character from the standpoint of decency. Under any other view two copies of the same publication might be mailed by as many different persons under identical circumstances, and yet before a liberal jury one would be acquitted, while the other, appealing to a jury of coarser mental calibre, would be sentenced to a long term of imprisonment. We are confident that such was not the intention of Congress when it framed § 3893 of the Revised Statutes.

Juries were instituted to try *disputed* questions of fact, and such should be the limit of their powers. But in the case at bar, as in all cases arising under § 3893, there is no question of *fact* as to what was sent through the mails, as the paper is in evidence, and there is absolutely no controversy as to the exact words or pictures objected to. The Court needs no further assistance from the jury, especially as there is involved a question of statutory construction in the determination of the obscene character of an instrument.

The steady march of progress in the history of judicial proceedings has witnessed a gradual narrowing of the spheres within which juries are confined. Time and again have Courts taken judicial notice of facts and of general human tendencies, withdrawn pure matters of fact from juries, when that proceeding seemed proper, and directed verdicts upon all the evidence submitted. In cases of malicious prosecution it is now the rule that the question of probable cause upon all the facts of the case is for the Court and not the jury. But it is needless to multiply instances showing that the general and healthy tendency is to enlarge the functions of the Court, and lessen those of the jury.

(4.) In the recent case of *United States* vs. *Swearinger*, now pending before this Court, which

was an indictment for sending obscene matter through the mails in contravention of § 3893 Revised Statutes, the U. S. District Court for the District of Kansas, on January 12, 1895, charged the jury as follows:

"Gentlemen of the Jury, the newspaper article in evidence here, which the defendant admits he published, is obscene and unmailable matter, and the only thing for you to pass upon is whether the evidence satisfies you beyond a reasonable doubt that the defendant deposited, or caused to be deposited, in the post office at Burlington, Kans., one or more copies of the newspaper containing this article as charged in the indictment."

(5.) In *Smith* vs. *State*, 24 Tex. App., 1, the Court say:

"The composition being a written one, it was the province of the Court to construe it and determine whether or not it was indecent and obscene. In construing it to be indecent and obscene, and in so instructing the jury, we think there was no error."

(6.) In *McNair* vs. *People*, 89 Ill., 441, Judge WALKER said:

"A majority of the Court are of the opinion * * * * that whether obscene or not is a question of law and not of fact; that the question is for the Court to determine, and not for the jury."

It is therefore most confidently submitted that the judgment of conviction be reversed and the plaintiff in error discharged.

Dated October 21, 1895.

WILLIAM N. COHEN,
Counsel for Plaintiff in Error.

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CASE No. 15651.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

LEW ROSEN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 424.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

LEW ROSEN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 424.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

Lew Rosen, the plaintiff in error, was indicted under Revised Statutes § 3893, as amended September 26, 1888. (25 Stat., 496.) The cause was tried March 27, 1894, before Judge Benedict and a jury. Rosen was convicted and sentenced to thirteen months' imprisonment at hard labor and a fine of $1, for mailing obscene, lewd, and lascivious matter.

The indictment averred that on April 24, 1893, at the southern district of New York, the accused—

> Did unlawfully, wilfully, and knowingly deposit and cause to be deposited in the post-office of the

city of New York, for mailing and delivery by the Post-Office Establishment of the United States, a certain obscene, lewd, and lascivious paper; which said paper then and there, on the first page thereof, was entitled "Tenderloin Number, Broadway," and on the same page were printed the words and figures following—that is to say: "Volume II, number 27; trade-mark, 1892; by Lew Rosen, New York, Saturday, April 15, 1893; ten cents a copy, $4.00 a year, in advance;" and thereupon, on the same page, is the picture of a cab, horse, driver, and the figure of a female, together (underneath the said picture) with the word "tenderloineuse;" and the said paper consists of twelve pages, minute description of which, with the pictures therein and thereon, would be offensive to the court and improper to spread upon the records of the court, because of their obscene, lewd, and indecent matters; and the said paper, on the said 24th day of April, in the year 1893, was inclosed in a wrapper and addressed as follows—that is to say, "Mr. Geo. Edwards, P. O. box 510, Summit, N. J." (Rec., p. 4.)

Section 3893 as amended is as follows:

Sec. 3893. Every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, * * * and every article or thing intended or adapted for any indecent or immoral use * * * are hereby declared to be nonmailable matter, and shall not be conveyed in the mails nor delivered from any post-office nor by any letter carrier.

And any person who shall knowingly deposit or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable matter * * * shall, for each and every offense, be

fined, upon conviction thereof, not more than five thousand dollars, or imprisoned at hard labor not more than five years, or both, at the discretion of the court.

The case was tried on the theory that the character of the paper was a question for the jury. Neither party suggested that it might be a question of law, nor was there any motion to acquit.

STATEMENT OF FACTS.

The course of the trial was peculiar. The Government, of course, began by undertaking to prove the mailing of the newspaper by defendant. His counsel interrupted the proceedings by admitting the fact. The paper was thereupon put in evidence and marked Exhibit 1, and the Government rested (pp. 10, 11).

Being asked what the defense was, counsel answered that the paper was not obscene. The newspaper is on file in the office of the clerk of this court. It corresponds to the description in the indictment. It contains a double page entitled, "Tenderloin Temptresses," made up of pictures of nearly nude females in different positions, after the style of the French illustrated weeklies. These females are partially, but not wholly, concealed by lampblack. Whether or not the pictures themselves would be regarded as lewd or lascivious, their partial concealment is evidently intended and calculated to make them so.

The copy put in evidence was mailed to Anthony Comstock, a United States post-office inspector, who had subscribed to the periodical under the name of George

Edwards. Comstock wrote back, complaining that "the paper on three pages is marred with a black substance marked over them" (p. 16). This letter was addressed to H. A. Brooks, the business manager (p. 15). He received in reply a letter signed "Broadway, per A. T. S.," telling him that the lampblack "is easily erased with a piece of bread" (p. 14). The initials were those of a boy who had general directions from Rosen himself to give these instructions to any one who complained (p. 14).

There was no dispute as to the responsibility for the contents of the sheet. Rosen took the stand in his own behalf, and testified that he caused the blacking to be done (pp. 11–12). In a previous trial he had testified that the sole responsibility was on himself, Brooks being merely his employee; and this admission was put in against him (p. 15).

Brooks testified in Rosen's behalf that the blacking was done "for an advertising purpose alone" (p. 17).

In summing up, Rosen's counsel seems to have taken the position that the blacking was immaterial, and the case must turn on the question whether the clean pictures were objectionable. The court so stated in its charge (p. 20), and no correction was made by counsel.

A cleaned copy of the same sheet was put in evidence as Exhibit 2, and is on file in the office of the clerk of this court.

ARGUMENT.

The points made in the brief filed on behalf of plaintiff in error will be taken up *seriatim*.

I.

ALLEGATION OF SCIENTER.

The indictment alleges that Rosen "did unlawfully, willfully, and knowingly deposit, and cause to be deposited, in the post-office * * * a certain obscene, lewd, and lascivious paper." Mr. Rosen complains that he was not informed by the indictment that he knew this paper to be obscene, etc. This is certainly very minute verbal criticism.

§ 1025 of the Revised Statutes provides as follows:

> No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.

Rosen not being a lawyer, it is respectfully submitted that he can hardly be supposed, until he consulted a lawyer, to have even guessed that he could be charged with unlawfully depositing, or willfully depositing, or even knowingly depositing an obscene paper in the post-office, without meaning that he knew the paper to be obscene. Unless some improper action on his part was charged, would the word "knowingly" be used with reference to the deposit? Certainly it would be a strange use of words to say that a man "willfully deposited" something in the post-office, when the deposit was entirely innocent; and still more would this comment apply to the phrase "unlawfully deposited."

Yet plaintiff in error insists that the indictment is not only defective, but defective in substance, so that it can not be cured by the broad provisions of § 1025 above quoted. He relies mainly upon a decision of Judge Paul in *United States* v. *Slenker* (32 Fed. Rep., 691), and upon the analogy of the cases of *Commonwealth* v. *Boynton* (12 Cush., 499) and *United States* v. *Carll* (105 U. S., 611).

It will be argued on behalf of the United States that if any defect exists, it is one of form merely; and that in fact there is no defect at all.

(A) *If a defect, it is one of form.* But if so, it is, of course, cured by the verdict under the section above cited, a section which has recently been often applied by this court.

That the defect is one of form has been twice decided by justices of this court when sitting at circuit.

In *United States* v. *Chase* (27 Fed. Rep., 807), heard before Mr. Justice Gray and Judge Colt, the court held as follows:

> Gray, Justice. This is an indictment on the act of July 12, 1876, c. 186 (19 St., 90). The first two objections taken to it are that the letter alleged to have been deposited in the mail is imperfectly described, and that the allegation that the defendant knowingly deposited an obscene, lewd, and lascivious letter is defective, because, construed by the technical rules of criminal pleading, the averment is only that the defendant knowingly deposited the letter, and not that he knew its character. * * * But both these objections relate to defects or imperfections in matter of form only, not tending to the prejudice of the defendant, and therefore under sec-

tion 1025 of the Revised Statutes affording no ground for a motion in arrest of judgment after a plea of guilty.

In commenting upon this decision, counsel for plaintiff in error takes the somewhat extraordinary position that it is "overruled" by the Carll case. It may be sufficient to remark that the Carll case was decided in 1882, while the decision under consideration was made in 1886, and that the opinions in both cases were written by Mr. Justice Gray. A case in 1882 can hardly overrule a case in 1886. The decision of 1886 simply is a ruling to the effect that the Carll case does not apply to an indictment for mailing an obscene publication—a ruling made by the one person best qualified to judge.

A decision to the same effect was made by Mr. Justice Brewer, sitting with Judge Nelson, in *United States* v. *Clark* (37 Fed. Rep., 106), which will be set forth more fully hereinafter.

The most that can be said against the indictment is that it is stated "without technical accuracy," as in *Dunbar* v. *United States* (156 U. S., 185, 192).

While originally the indictment was the only paper to be considered upon a motion in arrest of judgment, yet § 1025 now enables the court to look anywhere in the record for the purpose of ascertaining whether the substantial rights of the defendant were prejudiced; and when a bill of exceptions is made part of the record by defendant's action the court can look at the bill of exceptions also for this purpose. In the present case it is thus affirmatively shown that the defendant was not in any way misled.

(B) *It is not a defect.* Even on demurrer or motion to quash, the indictment would have been sufficient.

In the first place, assuming *scienter* to be a necessary averment, it is sufficiently averred.

The word "knowingly" implies guilt as well as knowledge (*Cliquot* v. *Champagne*, 3 Wall, 114, 144).

In *Felton* v. *United States* (96 U. S., 699, 702) in discussing a penal statute, Mr. Justice Field said:

> Doing or omitting to do a thing knowingly and wilfully implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it.

And he quotes Chief Justice Shaw (*Commonwealth* v. *Kneeland*, 20 Pick., 206, 220) as follows:

> The word "wilfully," in the ordinary sense in which it is used in statutes, means not only "voluntarily," but with a bad purpose.

And he further quotes with approval the following statement from 1 Bishop's Crim. Law, § 428:

> It is frequently understood as signifying an evil intent without justifiable excuse.

We quote at length from the opinion of Mr. Justice Brewer in *United States* v. *Clark* (37 Fed. Rep., 106), above referred to:

> The statute declares that whoever knowingly deposits nonmailable matter is guilty. The indictment alleges that the defendant knowingly deposited this nonmailable picture. Doubtless the question turns largely on whether the word "knowingly," as used in the statute and indictment, qualifies simply the adjacent verb "deposit" or the whole matter

> described. It may be conceded that ordinarily an adverb is understood as qualifying its adjacent verb; and yet that is not always true, and in construing words and sentences used in an indictment we are to give them their ordinary significance in the absence of some technical construction necessarily imposed upon them. Now, it is a familiar use of the adverb "knowingly" that it qualifies both its adjacent verb and the full act thereafter described. * * * When I say that a party knowingly deposited an obscene picture no one supposes that I mean that he simply deposited a picture the character of which he was ignorant of. All understand that I mean to say that he has deposited that which he knew to be obscene; and this because the adverb "knowingly," used in sentences of this kind by the common understanding of all, goes beyond the mere verb and includes broadly all that is expressed in the full act charged to have been done. Now, Congress, in the section under which this indictment was framed, chose to use language in this way; and, after defining what was nonmailable matter, declared that anyone who knowingly deposited such nonmailable matter should be punished. Shall I ignore this common understanding of the use of the word "knowingly" in sentences of this kind, or shall I recognize that Congress has used this language in its ordinary acceptation; and, having thus sufficiently described the offense, hold that an indictment which follows that description is sufficient?

After quoting Revised Statutes § 1025 the learned judge proceeds as follows:

> Can it be possible that the defendant was misled by the language of this indictment as to the exact offense with which he was charged? Did he for a

> moment suppose that he was charged with putting in the post-office something of which he was entirely ignorant, or did he understand from the ordinary meaning of the language used that he was charged with putting in the post-office an obscence picture—that which he knew to be obscene? I can have no doubt that he was fully informed as to the charge against him and not in the slightest degree misled. I am fully aware that there are authorities which do not concur with this view, and yet I think those authorities adhere too closely to the rigor and technicality of the old common-law practice, which even in criminal matters is yielding to the more enlightened jurisprudence of the present, a jurisprudence which looks evermore at the matter of substance and less at the matter of form. Believing that the defendant was fully informed of the matter charged against him, notwithstanding the cases cited to me of *Com.* v. *Boynton* (12 Cush., 499); *United States* v. *Slenker* (32 Fed. Rep., 691), I am constrained to hold that this indictment is sufficient.

This decision was followed by Judge O. P. Shiras in *United States* v. *Nathan* (61 Fed. Rep., 936).

The Boynton case, disapproved by Mr. Justice Brewer in the opinion above quoted, is referred to by Mr. Justice Gray in the Chase case, above cited, as an authority in point on this question. That case arose under an act making it a criminal offense to sell unwholesome meat, and Bigelow, J., in holding it necessary to allege *scienter* with great particularity, says that "the gist of the offense * * * consists in the guilty knowledge or real intent of a party in selling meat which he knows to be unfit for food." (*Commonwealth* v. *Boynton*, 12 Cush., 499.)

It is respectfully submitted, however, that the Boynton case requires a degree of precision which would now be regarded as extreme. The Carll case concerned a totally different form of statute. (See *Cannon* v. *United States*, 116 U. S., at pp. 78, 79.) The words there used were "feloniously and with intent to defraud."

The ruling of Mr. Justice Brewer in the Clark case is in accord with the general principles of criminal pleading as laid down in recent decisions of this court. Minute verbal criticism is not now indulged in when the purport of the charge is clear.

The general rules relating to indictments are laid down by Mr. Justice Woods in *United States* v. *Britton* (107 U. S., 655, 661), quoting the Carll and other earlier cases. Using the language of these earlier cases, he holds that—

> The general rule is that in indictments for misdemeanors created by statute it is sufficient to charge the offense in the words of the statute. There is not that technical nicety required as to form which seems to have been adopted and sanctioned by long practice in cases of felony. * * * But in all cases the offense must be set forth with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged. * * * The accused must be apprised in the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense. * * * It is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any

> uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.

In *United States* v. *Northway* (120 U. S., 327, 333) the defendant was charged with aiding and abetting the cashier of a bank in the misapplication of its funds. It was not alleged "that the defendant then and there knew that said Fuller was such cashier." Defendant was also a bank officer. The indictment charged that he "did aid, abet, incite, counsel, and procure the said Sylvester T. Fuller, he, the said Fuller, then and there being cashier and agent, as aforesaid, so, as aforesaid, to wrongfully, unlawfully, and willfully misapply," etc. It was held unnecessary to charge any *scienter* more distinctly.

In *St. Clair* v. *United States* (154 U. S., 134, 145, 146) similar verbal criticism was attempted. This was a murder case. The charge was that the accused did—

> Then and there piratically, willfully, feloniously, and with malice aforethought, strike and beat the said Maurice Fitzgerald, then and there giving to the said Maurice Fitzgerald several grievous, dangerous, and mortal wounds, and did then and there, to wit, at the time and place last above mentioned, him the said Maurice Fitzgerld cast and throw from and out of the said vessel into the sea, and plunge, sink, and drown him the said Maurice Fitzgerald in the sea aforesaid.

It was claimed that these words did not necessarily import that the casting, throwing, etc., was done willfully, feloniously, and with malice aforethought, a construction which was justified by the language of the indictment, if subjected to the same rules of criticism as those attempted

to be applied in the present case. The court, however, adopted more liberal rules of construction, Mr. Justice Harlan saying: "Any other rule of construction would compel the pleader to indulge in too much repetition. (*Heydon's Case*, 3 Rep., 7.)"

In *Potter* v. *United States* (155 U. S., 438, 444), when similar verbal criticism was attempted, Mr. Justice Brewer said:

> The offense charged is a statutory one, and while it is doubtless true that it is not always sufficient to use simply the language of the statute in describing the offense (*United States* v. *Carll*, 105 U. S., 611), yet if such language is according to the natural import of the words fully descriptive of the offense, then ordinarily it is sufficient.

See also *Dunbar* v. *United States* (156 U. S., 185, 192); *Coffin* v. *United States* (156 U. S., 432, 448); *Evans* v. *United States* (153 U. S., 584, 590).

In *Grimm* v. *United States* (156 U. S., 604), the indictment was under the same section as that involved in the case at bar. No *scienter* was alleged as to the character of the pictures. The indictment on demurrer was held sufficient.

In *Cochran* v. *United States* (157 U. S., 286), Mr. Justice Brown said:

> Few indictments under the national-banking law are so skillfully drawn as to be beyond the hypercriticism of astute counsel, few which might not be made more definite by additional allegations. But the true test is not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged,

> and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

In the second place, *scienter* is not one of the requisites of this statutory offense.

In *United States* v. *Smith* (2 Mason, 143, 150), Mr. Justice Story said, in 1820:

> Another exception is that it is not alleged that the defendant *knowingly* committed the offense stated in the second count. This is not required by the statute and need not be averred.

In *United States* v. *Malone* (20 Blatchf., 137, 141), an allegation of *scienter* having been omitted in an indictment for unlawful distilling, Judge Benedict, in an opinion concurred in by Mr. Justice Blatchford and Judge Brown, said (citing the above case and also 1 Stark Crim. Pl., 182, 183):

> Knowledge is not made by the statute to be an ingredient in the offense. When a statute prohibits generally and makes no reference to intention an averment of knowledge is unnecessary.

This principle was applied to the case of an obscene publication by Mr. Justice Blatchford in *United States* v. *Bennett* (16 Blatchf., 338, 352), and, as we have above seen, by Mr. Justice Brewer and Judge O. P. Shiras in subsequent cases.

The whole subject was discussed in the most interesting manner by Judge Philips in *United States* v. *Harmon*

(45 Fed. Rep., 414). This was an indictment for mailing an obscene publication under § 3893. The defense was that defendant's motive was to instruct and better the condition of the human race, and he was shown to bear a good character as a citizen. Unfortunately the opinion is too lengthy for insertion here. The argument of counsel is stated as follows (p. 419):

> The argument is that if the offense in question is completed by the mere overt act of knowingly placing in the post-office an obscene print, publication, etc., it would subject to indictment and punishment the judge of this circuit for sending the indictment herein containing the forbidden publication, sent him through the mail by mistake, back to the clerk of the court through the mails, or that such a publication made in a law book as a report of this case would subject the publisher to the penalty of the law for mailing it to his subscribers; that as the overt act of the judge, for instance, can only be exonerated in law by proof of the absence of criminal intent, the rule of exception must be indifferently applied, so that in every case the question of intent, motive, purpose, must be open to inquiry, and if there was no evil design, no *animus mali*, the jury should be directed to acquit.

The judge's comment is as follows (pp. 419–421):

> The deduction from this particularization has for its postulate a radical misconception of the postal organization and the scope and policy of the law touching obscene literature.
>
> * * * * *
>
> It is too much to claim that statutes of a highly penal character must universally require proof of the existence of a criminal intent in the violator in

the broad sense of that term. There is a recognized class of offenses where the thing done is hurtful, and the probable consequences may be injurious where "the intention is inferred from doing the act." As said by Blackburn, J., in *Rex* v. *Hicklin*, *supra*: "If the party does an act which is illegal, it does not make it legal that he did it with some other object."

* * * * *

In *Com.* v. *Mash*, 7 Mete. (Mass.), 472, the party was indicted and convicted for bigamy, where the defendant sought to show that her husband had absented himself for a great length of time, and she had remarried under the honest belief that he was dead. Chief Justice Shaw, *inter alia*, said: "It was urged in the argument that where there is no criminal intent there can be no guilt, and if the former husband was honestly thought to be dead, there could be no criminal intent. The proposition stated is undoubtedly correct in a general sense, but the conclusion drawn from it in this case by no means follows. Whatever one voluntarily does he of course intends to do. If the statute has made it criminal to do any act under particular circumstances, the party voluntarily doing that act is chargeable with the criminal intent of doing it."

This statute was predicated of the vast importance to society of preventing polygamy. In *Com.* v. *Emmons* (98 Mass., 6), the defendant was indicted and convicted for admitting a minor to his billiard room without the written consent of his parents. He sought to acquit himself of the act by showing that the defendant was almost of age, was fully grown, doing business for himself, and that he honestly believed that he was of age. The court says that this evidence is immaterial. "The prohibition

> of the statute is absolute. The defendant admitted him to his room at his peril, and is liable to the penalty whether he knew him to be a minor or not. The offense is of that class where knowledge or guilty intent is not an essential ingredient in its commission, and need not be proved." And on the same principle it is held by the supreme court of Missouri, in *Beckham* v. *Nacke* (56 Mo., 546), that a magistrate performing the marriage ceremony of a minor without the consent of his parents was liable to the penalty of the statute, although he acted under a *bona fide* belief that the minor was of full age, the law, as declared by the court, being to prevent the reckless marriage of minors without the consent of their parents.

In the Boynton and Carll cases the court expressly state that guilty knowledge and intent are elements of the statutory offense.

II.

OMISSION OF OBSCENE MATTERS FROM THE INDICTMENT.

The learned counsel for plaintiff in error sets out at great length the case of *Regina* v. *Bradlaugh* (L. R. 3, Q. B. D., 621), and deduces therefrom the conclusion that the whole of his "Tenderloin number" (for the whole is alleged to be obscene, lewd, and lascivious) should have been set out at full length on the face of the indictment, although, as alleged in the indictment—

> Said paper consists of 12 pages, minute description of which, with the pictures therein and thereon, would be offensive to the court and improper to be spread upon the records of the court, because of their obscene, lewd, and indecent matters.

There are thus two good reasons alleged for not setting out the matter at length: First, that it is too long, and second, that it is too offensive. The newspaper was, however, carefully identified by volume and number, as well as by a description of the first page. As the whole of the paper is alleged to be objectionable, there is no need of specifying any portions thereof for defendant's enlightenment.

The learned counsel for plaintiff in error finds that "in some books vague references have been made to an 'American doctrine' as distinguished from that of England, and as dispensing with the particularization of words or pictures characterized as obscene if the indictment state that the matters are too indecent to be spread upon the court records." He submits with some confidence that his "array of authority" (consisting of the Bradlaugh case, and one decision and one *dictum* in the Federal Reporter) "is sufficient to dissipate all notion of the existence of such an alleged 'American doctrine.'"

If the learned counsel had examined the American cases referred to in *Regina* v. *Bradlaugh*, we apprehend that he would have been convinced that there was an "American doctrine." If he had examined the opinion of Lord Chief Justice Cockburn in the Bradlaugh case below (*Regina* v. *Bradlaugh*, L. R. 2, Q. B. D., 569), he would have found that that learned justice was inclined to agree with the doctrine. If his researches had led him to the discovery of the case of *United States* v. *Bennett*, (16 Blatchf., 338, 343–351), he would have found a very full discussion by Mr. Justice Blatchford in 1879 of the

cases in Vermont, Massachusetts, Pennsylvania, Illinois, and Michigan, and an express approval of the American doctrine and disapproval of the opinions of the lords justices who reversed Lord Chief Justice Cockburn's decision in the Bradlaugh case. The American rule has since been recognized by the supreme court of Indiana in *Thomas* v. *State* (103 Ind., 419, 427), and has been indorsed by still other States. The later authorities are cited by Field, C. J., delivering the decision of the supreme court of Massachusetts in *Commonwealth* v. *McCance*, 41 N. E. Rep., 133 (June 24, 1895).

In *Grimm* v. *United States*, (156 U. S., 604, 608), Mr. Justice Brewer says:

> Again, it is objected that it is not sufficient to simply allege that the pictures, papers, and prints were obscene, lewd, and lascivious; that the pleader should either have incorporated them into the indictment or given a full description of them, so that the court could, from the face of the pleading, see whether they were in fact obscene. We do not think this objection is well taken. The charge is not of sending obscene matter through the mails, in which case some description might be necessary, both for identification of the offense and to enable the court to determine whether the matter was obscene, and, therefore, nonmailable. Even in such cases it is held that it is unnecessary to spread the obscene matter in all its filthiness upon the record; it is enough to so far describe it that its obnoxious character may be discerned.

III.

WHETHER ROSEN WAS ENTITLED TO ACQUITTAL.

The learned counsel for plaintiff in error insists that Rosen was not proved to have mailed the newspaper, and therefore that his conviction was unwarranted. He claims that this question is raised by the denial of the motion for a new trial on the ground that the verdict was "against the evidence" and "contrary to the law" and by certain assignments of error.

"No authorities need be cited in support of the proposition" that "the denial of a motion for a new trial can not be assigned for error." (*Holder* v. *United States*, 150 U. S., 91.) "The exception to the denial of the motion for a new trial upon the ground that the verdict was not supported by the amount and character of evidence that is required by law was untenable under the repeated rulings of this court." (*Moore* v. *United States*, 150 U. S., 57, 61.) Nor can an assignment of error raise a question which has not already been raised by an exception (*Tucker* v. *United States*, 151 U. S., 164, 170), unless it is an error that appears somewhere in the record outside of the bill of exceptions. In other words, the bill of exceptions can be used by plaintiff in error only in support of exceptions actually taken and reserved on the trial.

Nor can the fact that there is no evidence to support a verdict be assigned as error. Errors reviewable in this court are errors of law, but the finding of a verdict without evidence to support it is an error of fact. (See

Martinton v. *Fairbanks*, 112 U. S., 670, 674.) If the defendant in a criminal case thinks that there is no evidence against him, his remedy is to move for the direction of a verdict of acquittal, and if that motion is denied, except to its denial. If he fails to do this, he impliedly concedes that the case is one proper for the jury to consider, and can not afterwards retract his concession. Both parties having assumed that this case was one for a jury, it is the converse of *Beuttell* v. *Magone* (157 U. S., 154, 157).

The point of the learned counsel for plaintiff in error, however, that there is no proof of mailing by Rosen, is based on a very manifestly erroneous construction of the record. At the top of page 28 of his brief will be found certain extracts from the record which are inserted in the endeavor to show that what defendant admitted himself to have mailed was not the newspaper in question, but some letter. By reference to page 10 of the record it will be found that the extract given in the brief commences with the middle of a paragraph, and that the very sentence next previous to the first sentence quoted in the brief shows that the extract in the brief can be advantageously supplemented. The only letter which had been referred to on the trial was a letter *by* and not *to* Mr. Comstock.

Mr. Comstock, the post-office inspector, having testified concerning a letter which he had written to the business manager of Rosen's publication, then added: "I saw this defendant in reference to *this paper*." After a short colloquy between the court and Rosen's counsel the assistant

district attorney said: "I offer *this paper* in evidence." It was thereupon marked Exhibit 1 (p. 4). It is in the clerk's office of this court and appears to be the newspaper referred to in the indictment, and not a letter.

The reception of this newspaper in evidence, without any protest by defendant's counsel, was immediately preceded by a conversation which amounted to a tacit admission of its deposit in the mail by defendant. In order that there might be no mistake, the following conversation ensued (p. 11):

> The COURT. What is your defense here?
> Mr. CARPENTER. That this is not obscene.

It is thus very plain that the admission of mailing related to this newspaper and not to any letter *to* Mr. Comstock. No such letter was referred to on the trial until after the Government rested its case. It is very clear that the word "letter" in Mr. Carpenter's remark, on page 10 of the record, is a mistake for "paper"; either a mistake by the stenographer or a mistake by the person who drew up the bill of exceptions, or a slip of the tongue by Mr. Carpenter himself, not noticed by any person during the trial.

Mr. Rosen immediately thereafter went on the stand himself and made it very clear that the entire edition was sent out at his own instance. Being asked, "How did you happen to black that edition?" the court interposed by saying: "That does not make any difference. If he mailed the paper, as he admits he did, he committed the crime if the jury find what he mailed was obscene." This reference to the admission of mailing

called forth no comment from defendant or his counsel (p. 12). When the question of the mailing of the paper was brought up again in Mr. Comstock's testimony in rebuttal the court interposed, saying: "It is admitted that he mailed it." Again no protest was made by Rosen's counsel (p. 15).

In instructing the jury the court said:

> The intent in this case is not the most material question here, because the defendant admits that he mailed the paper. He says he mailed this paper which is put in evidence, and that he intended to mail it. So you will find, I assume, that according to his admission he did it because he said he did. I stopped the entire proof because he says he mailed it. The act of putting that paper in the mail is admitted by the defendant (pp. 19, 20).

No exception or correction was made by defendant's counsel.

It is claimed, however, that defendant's counsel had no right to make the admission, and the case is treated as if a formal admission of counsel, acquiesced in by the client on the trial, stands on the same ground as an extra-judicial confession through an attorney. Defendant's present argument would require all the *minutiæ* of the prosecution's case to be proved in court, notwithstanding counsel and client are ready and anxious to admit the larger part of them, and notwithstanding that their proof in detail might be a terrible hardship on the unfortunate client in subjecting him to excessive expense in defending the case. It is respectfully submitted that there is no such unreasonable doctrine in the law.

In *Regina* v. *Thornhill* (8 C. and P., 575), Lord Abinger said:

> In a criminal case tried in the Crown side of the assizes, I can not allow any admission to be made on the part of the defendant, *unless it is made at the trial* by the defendant or his counsel.

Authorities are cited on this point by Mr. Austin Abbott in his Brief for the Trial of Criminal Cases, § 420, and he states the rule as follows:

> A formal admission of a material fact, made either by the prosecuting officer or the counsel for the accused, in the course of the trial of the issues, and for the purpose of influencing the course of the trial, is conclusive, respectively, on the State or the accused for the purposes of the trial.

IV.

THEORY THAT THE LAMPBLACK EFFACED THE CRIME.

Plaintiff in error now claims that the paper could not be obscene, because the pictures were blackened over. This is contrary to the position taken by counsel on the trial, where he said "that the defendant is to be judged by the paper when the blacking is rubbed off" (p. 20). It clearly appears, as stated in the brief for plaintiff in error, that the newspaper as sent out was blackened over. But it nowhere appears that the blacking concealed the objectionable pictures. We have the original exhibit on file here to show the contrary. It is nowhere stated that the blacking was done in order to conceal the pictures. Mr. Brooks, the business manager, said: "It was done

for an advertising purpose alone" (p. 17); in other words, to make the pictures more suggestive if possible.

This position is attempted to be based on the exception at page 11 of the record, but that is an exception to the denial of a motion to dismiss proceedings at the close of the Government's evidence. When defendant thereafter went into evidence on his own behalf the exception was waived. (*Union Pacific Railroad Co.* v. *Daniels*, 152 U. S., 684; *Wilson* v. *Haley Live Stock Co.*, 153 U. S., 39; *Runkle* v. *Burnham*, 153 U. S., 216.)

V.

It is claimed that the newspaper can not be made the subject of a criminal proceeding, because it was sent in response to a decoy letter. This claim is completely disposed of by *Grimm* v. *United States* (156 U. S., 604), applying a principle which has been almost undisputed in the law since eleven judges laid it down in England in *The King* v. *Egginton* (2 Bos. & P., 508).

VI.

This point is disposed of by the fact that there is no exception in the record. (*Tucker* v. *United States*, 151 U. S., 164, 170.)

VII.

The court refused to charge "that if there is a reasonable doubt as to whether Mr. Rosen himself knew that the publication was obscene, [the jury] should acquit him" (p. 22).

The instruction, of course, is to be construed in connection with the facts shown on the trial. (*Spalding* v. *Castro*, 153 U. S., 38.) It is therefore to be borne in mind that there was no question as to Rosen's thorough familiarity with the contents of the paper (for he himself had directed the lampblacking); so that the defense which his counsel attempted to raise was that, although he knew the contents, he did not know that the law would hold them to be obscene.

In other words, it was an attempt to establish ignorance of the law as a defense.

As has already been shown in this brief, criminal knowledge and intent is not part of this statutory crime. We shall not repeat here the opinions of Mr. Justice Brewer and Judge Philips. The object of the statute is "to purge the mails of obscene and indecent matter, as far as it is consistent with the rights reserved to the people and with a due regard to the security of private correspondence from examination." (*United States* v. *Chase*, 135 U. S., 255, 261.)

In *United States* v. *Murphy* (32 Fed. Rep., 376, 383), a timber trespass case, Mr. Justice Jackson said:

> The defendant, knowing all the facts, intended to do just what he did do. The only mistake, if there was any, was a mistake of law as to what he could lawfully do.

In *Reynolds* v. *United States* (98 U. S., 145, 167), a polygamy case under the Edmunds Act, Chief Justice Waite said:

> A criminal intent is generally an element of crime, but every man is presumed to intend the necessary

> and legitimate consequences of what he knowingly does. * * * Every act necessary to constitute the crime was knowingly done, and the crime was therefore knowingly committed. Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law.

In *Halsted* v. *State* (41 N. J. Law, 552, 589), a prosecution against county officers for spending more than their appropriation, Chief Justice Beasley says:

> The position of the defense is well calculated to strike the mind with great force, for we have there as the elements of the juncture that the defendant was honest, that he acted with caution, and that he was compelled to act. * * * The defendant in this case pleads that he was ignorant of the law as applied to the facts involved in his conduct. But it has been many times decided, and indeed is the admitted general rule, that ignorance of the law is no defense against a criminal charge.

Many authorities will be found cited by counsel and court in this case to the same effect.

Mr. Bishop says (1 Bish. Crim. Law, 7th ed., § 309):

> If a man deems that to be right which the law pronounces wrong, and accepts it as a duty to do what the law says is a crime, this is a sort of mistake which does not free him from guilt. Perhaps it should be regarded as ignorance of law and not of fact. [Instancing the case of obscene libel.]

VIII.

Anthony Comstock, the Government witness, admitted on cross-examination that he had testified on a previous

trial for this same offense of Mr. Brooks, Rosen's business manager. Concerning his testimony on this occasion, Comstock said (p. 11):

> I did not swear that the wrapper which inclosed this paper which is put in evidence was in the handwriting of Mr. Brooks. I testified Mr. Brooks stated that it was his handwriting.

Mr. Brooks was thereafter called as a witness by Rosen's counsel and asked the following question, which was excluded (p. 18):

> Q. Did you hear him then swear that you wrote the direction on the wrapper of the paper that was sent to George Edwards, Summit, New Jersey?

An essential difference will be noticed here. Swearing that a paper is directed in a man's handwriting is a different thing from swearing that the man wrote the direction. The former is matter of opinion, and the latter is matter of fact. The latter implies a very much greater claim of familiarity with the facts on the part of the witness. For this reason it may be regarded as very doubtful whether sufficient foundation was laid for the question asked of Mr. Brooks. Possibly its exclusion was for this reason. (*Mattox* v. *United States*, 156 U. S., 237.)

Defendant, however, can not have been prejudiced in any respect by this matter, in view of the admissions made by defendant himself and by his counsel. The accuracy of Mr. Comstock's recollection had no material bearing upon the issues involved on the trial.

IX.

It is claimed that there was error in admitting in evidence a copy of a letter written by Comstock to Brooks, because the original was not accounted for. Brooks was Rosen's business manager. The receipt of the letter was admitted. It was therefore, if not destroyed, in the custody of defendant himself, and a notice to produce afforded sufficient foundation for the introduction of the letter. (*Dunbar* v. *United States*, 156 U. S., 185.) It was not claimed that insufficient notice was given.

X.

The views of the undersigned on the question raised by the tenth point in the brief of plaintiff in error are stated in the brief for defendant in error in *Swearingen* v. *United States*, submitted to this court October 21, 1895, and not yet decided.

That the question can not be raised in this case would follow from the argument in III *supra*.

It is respectfully submitted that the judgment should be affirmed.

EDWARD B. WHITNEY,
Assistant Attorney-General.

9 Orig.

Refuse

Office Supreme Court, U. S.
FILED.
NOV 18 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court

161-52 OF THE

UNITED STATES.

IN RE GEORGE F. EMBLEN.

MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS WITH STATEMENT, BRIEF AND ARGUMENT.

HENRY B. O'REILY,
Attorney for Petitioner.

In the Supreme Court

OF THE

UNITED STATES.

IN RE GEORGE F. EMBLEN.

MOTION for leave to file petition for mandamus, and for an *order* to show cause why the alternative writ should not issue.

PETITIONER George F. Emblen, submits his petition for a writ of mandamus to require the Honorable the Secretary of the Interior to proceed with the adjudication of a certain land contest pending in his department; and, such leave being granted, that an order issue requiring him to show cause, if any there be, why an alternative writ should not issue as prayed for therein.

By his attorney,

HENRY B. O'REILLY.

In support of this motion petitioner respectfully submits:

STATEMENT OF FACTS.

As the determination of this motion necessitates a consideration of the petition herein; and, as such petition is as brief a statement of the facts necessary to present the issues of law as counsel could well prepare, with legal accuracy and precision, it is here submitted as his statement of this case.

Petition for Mandamus.

Petitioner George F. Emblen respectfully represents.

1. That during February, 1885, the southeast quarter of section 22, township 2 north, of range 48 west, within the Denver land district, Colorado, was, and for a long time prior thereto had been, a part of the unappropriated public domain, suitable for agricultural purposes, and subject to entry and purchase under the preemption and homestead laws.

2. That February 26th, 1885, one George F. Weed, then and still a citizen of the United States, claiming lawful right of entry and pre-emption, made and filed in the land office of said Denver District, his declaratory statement, under oath, alleging settlement by him upon said quarter section February 18th, 1885, his purpose to occupy and cultivate the same, and to acquire title thereto under and in compliance with the requirements of the acts of Congress and the regulations of the Land Department governing the pre-emption of government land in that behalf made and provided.

3. That upon final proofs of settlement, improvement, cultivation, residence, etc., upon said land and the payment of the government purchase price therefor, September 19th, 1885, the register and receiver of said Denver Land District, delivered to him a cash entry certificate of purchase of said land entitling him in due course to a patent therefor.

4. That October 4th, 1888, no patent having yet issued therefor, petitioner Emblen, then and still a citizen of the United States, and with lawful right of entry and purchase of government lands, made and filed with the register and receiver of said Denver Land District, his protest against the issuance to said Weed of a patent for said quarter section, alleging fraud, misrepresentation and perjury upon the part of said Weed, touching his alleged settlement and occupation of said land, and as to his purpose in mak-

ing entry thereof; praying an opportunity to support his said protest and charges by proper evidence; and asking that he be allowed all the rights of a contestant under section 2 of the act of May 14th, 1880.

5. That such proceedings were had therein before said register and receiver that after hearing the evidence and the arguments of counsel touching the same, said protest and contest was dismissed May 21st, 1889.

6. That upon appeal therefrom, duly prosecuted, the Honorable the Commissioner of the General Land Office, finding from the evidence of record that said Weed had never before the date of final cash entry become a bona fide resident upon said land, or resided on the same in good faith, reversed said decision of the register and receiver, and held the entry for cancellation February 20th, 1890.

7. That on motion of said Weed for review and upon application of the Board of Trustees of the town of Yuma (which had been built upon said land) and others in interest, to intervene, alleging a population of 600 in said town and a property valuation of $300,000, a re-hearing was allowed, though the commissioner declared that no sufficient showing had been made therefor.

8. That shortly thereafter a new land district was created with offices at Akron, Colorado; and that as said land was in said district said contest and re-hearing thereof was transferred to Akron; that because of the fact that the receiver of said office was personally interested in the result of the contest, claiming ownership of a portion of the premises by conveyance from Weed, petitioner herein protested against the hearing of said contest by such receiver; and, his said protest having been overruled, he declined to appear before him or submit to his jurisdiction; that thereupon said hearing was had upon the part of said Weed alone, and, November 4th, 1890, said receiver and the register of said office decided in favor of said Weed and dismissed said contest.

9. That upon successive appeals to the Commissioner of the General Land Office and to the Secretary of the Interior. said decision, dismissing said contest, was approved.

10. That a petition for review, with affidavit of newly discovered evidence, was sustained by the Secretary of the Interior August 25th, 1893. and in his ruling and decision thereon, "after careful examination of the entire record" he determined and declared, among other things,—17 L. D 220 —that:

'The evidence at the first hearing at Denver unquestionably warranted the decision of Commissioner Groff in holding the entry for cancellation.'

* * *

"It is shown by the record that the receiver at Akron had some property rights that would be disturbed by the cancellation of this entry.

* * * * *

"Every consideration of propriety would dictate that one having an interest in the controversy should not be permitted to control or participate in the judgment. Such an exercise of jurisdiction is abhorrent to English and American jurisprudence. In fact such an interest, *per se*, disqualifies the court from exercising jurisdiction."

* * * *

"I am aware that if this entry should be cancelled, many titles may be disturbed, and, doubtless, some innocent purchasers would suffer; but I cannot allow the decision of this department to stand without further investigation, in view of the very doubtful, and even suspicious, record before me."

* * * *

"This department will detail a competent and efficient agent to represent the interests of the government at said hearing."

11. That before such hearing was had, with a view to evade the effect of said ruling and decision, and the inevi-

table result of such further hearing, said Weed, and others in interest with him, secured the passage by Congress of an act, approved December 29th, 1894, confirming his said entry of September 19th, 1885, and directing that a patent is sue to him for said land.

12. That solely in pursuance of said act patent was issued to said Weed in February, 1895.

13. That by reason alone of the passage of said act, the Honorable, the Secretary of the Interior, suspended all proceedings in said contest, and declined, and still declines, to authorize or direct, further hearing, trial or consideration thereof, as by law provided, or at all.

14. That though offering to waive his preference right of entry in order thereby to be relieved of a portion of the very onerous costs and expenses of prosecuting this contest, yet was petitioner's application and motion in that behalf denied by the register and receiver at Denver in April, 1889; and that he has at all times been required to pay, and has paid, all the costs, fees and expenses of this contest as by section 2 of the act of May 14th, 1880, required, and thereby preserved his rights in and to said land secured to him by said section 2 and to his heirs by amendment thereof July 26th, 1892.

15. That in good faith, in full reliance upon, and in pursuance of, the acts of Congress, and the rules and regulations of the Land Department in that behalf made and provided, and in confident expectation of realizing the full fruition of said contest he has devoted thereto years of unremitting labor and industry; paid out large sums of money for land office, witness and counsel fees, costs and expenses; and has incurred on account thereof obligations to the extent of many thousands of dollars.

16. That it is his desire that the contest proceed to final adjudication and disposition thereof; and that, should he succeed therein, it is his purpose to claim and to exercise

his preference right of entry and purchase of said land as by law authorized and provided.

WHEREFORE he prays the judgment and consideration of the Court:—

That said act of December 29th, 1894 be held and declared void as wholly beyond the power of Congress in that behalf.

That said patent be in like manner held and declared void because issued without warrant or authority in law, solely in pursuance of said void enactment,

That a writ of mandamus issue directed to the Honorable the Secretary of the Interior requiring him to proceed to the final adjudication and disposition of said contest in accordance with the general acts of Congress and the rules and regulations of the Land Department in that behalf made and provided, or that he make return thereto showing good cause, if any there be, why he should not be required so to do.

That upon final hearing and disposition of this cause, a peremptory mandamus issue for the purposes aforesaid; and that judgment be rendered as right and justice may demand. By his Attorney,

HENRY B. O'REILLY.

(Duly verified by Enblen as true of his own knowledge before the Clerk of the United States Circuit Court, Colorado District.)

* * * * * *

The Act referred to is as follows:

An Act to perfect the title to a quarter section of land in the town of Yuma, Colorado.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the pre-emption cash entry numbered forty-nine hundred and ninety, of George F. Weed, made at the District land office at Denver, Colorado, on the nineteenth of September, eighteen hundred and eighty-five, for the southeast quarter

of section twenty-two, township two north, of range forty-eight west, which tract embraces the town of Yuma, Colorado, the county seat of Yuma County, Colorado, be, and the same is hereby, confirmed, and that patent of the United States issue therefor to the said Weed.

Approved, December 29, 1894.

* * * * * *

When this bill was before Congress in its original form at the request of the Chairman of the Committee of Public Lands for an expression of his opinion with referance thereto the Honorable the Secretary of the Interior replied as follows:—

DEPARTMENT OF THE INTERIOR,
WASHINGTON, MARCH 16, 1894.

1863—1894.

Hon. Thos. C. McRae,
CHAIRMAN COMMITTEE OF PUBLIC LANDS,
HOUSE OF REPRESENTATIVES.

Sir:

I am in receipt, through your reference with a request for an expression of the views of this Department thereon, of House bill No. 5713, "To perfect the title to a quarter section of land in the town of Yuma, Colorado."

It is proposed by the said bill to issue patent upon application by the county judge of the county of Yuma, Colorado, to him, as trustee, for the several use and benefits of the present owner of the SE. ¼ of Sec, 22, T. 2 N., R. 48 W., 6th p. m., State of Colorado. Said tract is at present embraced in the pre-emption cash entry made by George F. Weed, on September 19, 1885.

On October 4, 1888, one George F. Emblen began a contest against said entry, which is still pending undetermined in this Department, the last order in which was that contained in departmental decision of August 25, 1893, (17 L. D. 220,) in which a new hearing was directed for the reasons set forth in said order. By a reference to said departmental decision of Augnst 25, 1893, a full history will be

found of the proceedings heretofore had in this matter.

The evident purpose of this bill is to legislate Emblen out of any rights he may have acquired under proceedings heretofore had in the matter of his contest initiated against Weed's entry.

I can see no reason for the proposed legislation and join with the Commissioner of the General Land Office in recommending that the same be not passed.

A copy of the report of the Commissioner of the General Land Office on this bill, dated February 21, 1894, is submitted herewith for your information.

In conclusion I have to state that the hearing ordered by this Department in the decision referred to, was suspended until a new receiver should be appointed at the Akron land office, which office has been recently filled, and the adjudication of the case will be proceeded with without delay.

Very respectfully,

(Signed) HOKE SMITH,
SECRETARY.

QUESTIONS OF LAW.

The question of law arising upon this petitition, and upon the records to which it refers, are of serious and grave moment.

I.

After entry, final proof, payment of the purchase price, and the issuance and delivery, by the register and receiver, to the entryman, of a cash entry patent certificate, is such land any longer a part of "*the territory or other property belonging to the United States*," so as to authorize Congress to "*dispose of*," or to make "rules and regulations" respecting the same as by ¶ 2 Sec. III Art. IV of the Constitution authorized?

II.

When the right of such entryman to patent is contested as by law provided; when contestor claims and is entitled

to the preference right of entry, upon the cancellation of such original entry, as by acts of Congress in that behalf provided; when such contest has progressed for many years, at the expense of contestor as by law required; when by the latest adjudication therein it is by the highest authority declared that the evidence unquestionably warranted the Commissioner in holding the entry for cancellation, "because of fraud, misrepresentation and perjury upon the part of the entryman; and after a new hearing had been by the Secretary of the Interior ordered, can Congress pending such new trial, and while such contest is undisposed of, pass a valid act confirming such fraudulent entry, and directing patent to issue to such corrupt entryman in defiance of the lawful adjudications of the Commissioner and of the Secretary, and in disregard of the general laws of Congress, and of the rules and regulations of the land department.

III.

Can Congress confirm an entry, fraudulent and void, under the general laws of Congress, and so declared by the Land Department?

IV.

Can Congress confirm an entry while held for cancellation, or suspended, by the Land Department, pending further hearing?

V.

Can one who is not entitled to government land under the general laws of Congress and the rules and regulations of the Land Department, applicable alike to all persons, secure title by special act passed in utter disregard of such general laws?

VI.

Is it within the power of Congress, by special act, or otherwise, to deprive an individual of a valuable right and privilege—contractual, at least, if not vested—secured to him and to his heirs by general laws in necessary compliance

with and upon the faith of wnich he has expended years of labor and many thousands of dollars?

VII.

Can Congress deny to anyone within its jurisdiction the equal protection of the laws?

VIII.

Was not this act in its effect upon petitioner a bill of pains and penalties, and so embraced within the inhibition against bills of attainder?

IX.

If the act in question is void, and the patent issued thereunder necessarily so, can this court in this proceeding so declare, and, disregarding the same as void, direct that this contest proceed to final adjudication thereof in due course?

BRIEF.

I.

At the time of the passage of this act the land in question had been segregated from the mass of the public domain; it was no longer any part of the "territory or property" of the United States; it was in fact and in law private property.

Wilcox vs. Jackson, 13 Pet. 498.
U. S. vs. Turner, 54 Fed. 228.
Reichart vs. Felps, 6 Wall. 160.
Kausas Pacific vs Dunmeyer, 113 U. S. 529.
U. S. vs Southern Pacific, 146 U. S. 570.
Borden vs Northern Pacific, 145 U. S. 535.

II.

If private property Congress had no dominion over it.

After cash entry of public lands the power of Congress to dispose thereof ceases, or is certainly suspended, until such entry may be cancelled or forfeited as by law authorized.

The specific reservation to the people--Art. X Amdts.

Const.—of all powers not expressly granted, precludes the lawful exercise by Congress of any authoity not strictly within the terms of that delegated.

As to the public domain, the sole authority of Congress is embraced in P 2 of Sec. 3 of Art. IV.

"The Congress shall have the power to dispose of, and make all needful rules and regulations respecting, the territory or other property *belonging to the United States.*"

"*Expresssio unius est exclusio alterius.*"

III.

The act is void as an unprecedented and unwarranted interference with the judicial proceedings of a tribunal lawfully established while actually engaged, within the sphere of its lawful authority, in the determination of a controversy touching the respective rights of individuals to certain property.

As declared by Mr. Justice Johnson in Fletcher vs. Peck, 6 Cr. 87:—

"There are some principles which impose laws even upon the Deity!"

Confusion and chaos must necessarily result where one department of the government is permitted to encroach upon, or to usurp, any of the powers properly belonging to another.

As well might the planets abandon their respective orbits.

This principle has ever been as scrupulously adhered to as it has been rigidly enforced by this court.

Altiazarus vs. Santa Rite Mining Co,, 148 U. S. 80.
Steel vs. Smelting Co. 106 U. S. 447.
Germania Iron Co. vs. U. S., 58 Fed. 334.
Marquis vs. Frisbie, 101 U. S. 473.
Casey vs. Vesey, 50 Fed. 258.

IV.

The act is void as an unprecedented and unlawful attempt, by special act, to deprive petitioner of a very valua-

ble right, and exclusive privilege, secured to him and to his heirs, by general laws, then and still in full force, upon the faith of which he had expended, as by law required, much time and money.

It was an endeavor to abrogate a contractual, if not a vested, right, secured to petitioner upon compliance with, and in pursuance of, lawful acts of Congress.

Shepley vs. Caown, 91 U. S. 330.

Reichart vs. Felps, 60 Wall 160.

Stoddard vs. Chambers, 2 How. 284.

As to petitioner the act was in effect a bill of pains. and penalties, and so embraced within the inhibition against bills of attainder.

Fletcher vs. Peck, 6 Cr. 87.

V.

The act is void because it denied to petitioner the equal protection of the laws.

This beneficent rule, imposed upon all the departments and powers of state government, by the 14th amendment of the constitution, being of the very essence of natural right and justice is alike obligatory upon Congress.

VI.

If the act be void the patent issued thereunder upon the sole authority thereof must necessarily be void.

Earl of Leicister vs. Sir Chr. Heydon, Plowden 384

If the act be void, the patent issued in violation of general and valid legislative acts, must also be void.

VII.

If the act of Congress be void it is witnin the power of the proper court, in this proceeding, so to declare.

McPherson vs. Blacker, 146 U. S.)

Board Liquidation vs McComb, 92 U. S. 531.

Osbsrne vs. Bank of U. S., 9 wh. 738,859.

Virglnia Coupon Cases 114 U S. 269.

Norton vs. Shelby Co., 118 U. S. 425.

Powell vs. Pennsylvania, 127 U. S. 678.

VIII.

If the act be void, and the secretary declines to proceed with this contest solely on account thereof, mandamus is the proper remedy to require him to reinstate said cause and to proceed with the judicial disposition thereof in due course.

In re Hohorst, 150 U. S. 643.
McPherson vs. Blacker, 146 U. S. 1.
N. Y. Co. vs. Wilson, 8 Pet. 291.
Exparte Morgan, 114 U. S. 174.
Livingston vs. Dorgenois, 7 Cr, 577.

IX.

As the proper disposition of this land contest requires the exercise of j dicial consideration and judgment; as from such judgment there is no relief by appeal, error, certiorari, or other remedy; as this court is vested with a supervisory authority over inferior tribunals, it may in the exercise of its original jurisdiction grant the relief prayed for herein.

Exparte Crane, 5 Pet. 190.
Ex parte Morgan, 114 U. S, 174.
Livingston vs. Dorgenois, 7 Cr. 577.

ARGUMENT.

As to many of the principles for which petioner contends, argument or citation of authorities seems wholly unnecessary in this Court.

I

AT THE TIME OF THE PASSAGE OF THIS ACT THE LAND WAS NOT PUBLIC PROPERTY.

In Wilcox & Jackson supra this language is used, Barbour J—P. 513,

"Whenever a tract of land shall have been once legally APPROPRIATED to any purpose, from that moment the land thus appropriated becomes segregated from the mass of public lands; and no subsequent LAW, or proclamation or SALE would be construed to embrace it, or to operate upon it".

In Witherspoon & Duncan 4 Wall 210 touching the

right to subject such land to state taxation upon the issuance of patent, Mr. Justice Davis—p. 218—

"In no just sense can lands be said to be public lands after they have been entered at the land office, and certificate of entry obtained."

"If public lands before the entry, after it they are PRIVATE PROPERTY".

P. 219. "In either case, when the entry (cash or donation) is made and certificate given the particular land is segregated from the mass of the public lands and becomes PRIVATE PROPERTY."

U. S. vs. Turner, 54 Feb. 228, is a notable illustration of this principle.

At the suit of the government Turner had been enjoined from operating or maintaining a railroad over public lands.

After homestead entry of the land, right of way was granted Turner by the entryman.

Turner then renewed operation of his road over this land.

Thereupon, the injunction being still in full force, he was cited for contempt, but was discharged, the Court holding that the homestead entry acted as an appropriation of this land and segregated it from the mass of the public domain.

In support thereof was cited as follows the opinion of Attorney General McVeigh rendered in 1881:

"Upon entry the right of settler attaches to land, to be defeated only by failure to comply with requirements of law."

"Until forfeiture for failure to comply, his equitable interest in the land prevails over all—GOVERNMENT INCLUDED."

"That upon entry land is segregated from public domain appears from Sec 2297, Rev St U S wherein it is provided that in certain contingencies land reverts to the government.

1 Copp. Pub. L. Laws, 1882, p. 388.

Leavenworth R. Rd. vs. U. S. 92 U. S. 733,

Kansas Pacific Ry. vs Dunmeyer, 113 U. S. 529.

U. S. vs. Southern Pacific, 145 U. S. 570; and

Borden vs. Northern Pacific, 145 U. S. 535, are notable illustrations of the principle for which we herein contend.

In the latter case all prior cases are clearly analyzed and reviewed.

Commenting with approval upon the doctrine of appropriation announced in Wilcox vs. Jackson, supra, the Court through Mr. Justice Field —p. 839.

"The validity and effect of the appropriation do not depend upon its being subjected afterwards to cancellation because of the omission of some particular duty of the party claiming its benefit."

In Witherspoon vs. Duncan, 4 Wall. 210, 218, Court held that if a party entitled by law to enter land at the land office does so, when the certificate of entry is given to him, a CONTRACT is executed between him and the government, and thereafter the land ceases to be a part of the public domain

And. quoting the language of Mr. Justice Lamar, in Has. tings Ry. vs. Whitney, the Court declared:

"In the light of these decisions the almost uniform practice of the department has been to regard land upon which an entry of record valid, upon its face, has been made, as appropriated and withdrawn from subsequent homestead entry, preemption, settlement, sale or grant, until the original entry be cancelled or declared forfeited; in which case the land reverts to the government as part of the public domain, and becomes again subject to entry under the land laws."

The land in question was not then territory of the United States; it had not, by cancellation or forfeiture of entry, reverted to the government.

The legislative power of Congress over it had ceased or had been suspended at least.

The act was void; and the patent issued thereunder necessarily so.

Earl of Leicester vs. Heydon, Plowden, 384.

Monroe Cattle Co. vs. Becker, 147 U. S. 47.

II

THE ACT WAS A GROSS ABUSE AND EXCESS OF LEGISLATIVE POWER IN ATTEMPTING TO DISREGARD AND OVERRIDE JUDICIAL AUTHORITY.

The same rule which has ever been so scrupulously observed by the court should control Congress and every other department of the government.

In Steel vs Smelting Co., 106 U. S. 447 it is declared—

"Courts will not interfere by injunction, mandamas or bill in equity, with the action of any other department of government still pending and within its authority."

In Ger. Iron Co., vs U. S. 58. Fed. 334 Court of Appeals—

"The courts have refused to take any action that would intefere with or frustrate the final action of the land department in a controversy properly pending before it."

In Astiazarian vs. Santa Rita Mining Co., 148 U. S. 80, on appeal to the Court touching conflicting claims to certain Mexican grants, confirmation of which was pending in Congress, the Court, through Mr. Justice Gray, declared:

"The action of Congress when taken being conclusive upon the merits of the claim, it necessarily follows that THE JUDICIARY CANNOT ACT UPON A MATTER WHILE IT IS PENDING BEFORE CONGRESS."

* *

"The case is one of those, jurisdiction of which has been committed to a particular tribnual, and which cannot, therefore, AT LEAST WHILE PROCEEDINGS ARE PENDING BEFORE SAID TRIBUNAL, be taken up and decided by any other."

The judicial consideration and judgment of the Land Department, within the scope of its authority, is entitled to as much respect, and is as conclusive, as that of any other tribunal established under the constitutinn.

In Steel vs. Smelting Co. 106 U. S. 447 it was declared through Mr. Justice Field, P. 450—"We have had occasion so often to speak of the Land Department, the object of its creation, and the powers it possesses in the alienation by patent portions of the public lands, that it creates an un-

pleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on that subbject."

"The department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States, to portions of the public domain, is obtained, and to see that the requirements of different acts of Congress are fully complied with."

"Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale."

'Its judgment upon these matters is that of a SPECIAL TRIBUNAL, and is unassailable except by direct proceedings for its annulment or limitation."

"Such has been the uniform language of this court in repeated decisions."

"In Johnson vs. Towsley, 13 Wall. 72, 83, the effect of the action of that department was the subject of special consideration. And the court applied the general doctrine."

"When the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, IS CONCLUSIVE UPON ALL OTHERS."

In Germania Iron Co. vs. U. S. 58 Fed. 334—a case fully and ably considered—

"This [the Land] Department has established rules and regulations for the orderly conduct of its business which, within certain well defined limits, have the force and effect of law, AND ON THE DUE OBSERVANCE OF WHICH ALL CITIZENS have a right to rely."

Citing Kempf vs. Smelting Co., 104 U. S. 639.

"The courts have refused to take any action that would interfere with or forestall the final action of that department in a controversy prorerly pending before it."

Citing—Marquis vs. Frisbie, 101 U. S. 473.

Casey vs. Vasser, 50 Fed. 458.

In that case patent had been issued, by mistake it was

claimed, for property then worth $75,000.

"Not only in violation of a long standing rule of the department, but contrary to an express order of the Commissioner of the General Land Office, SUSPENDING, for the time being, all action looking to a disposal of this land."

"The interest of the government lies in its obligations to its citizens to see that the rules and regulations made by the Land Department for the guidance and protection of the citizens are faithfully observed, and in the farther fact that a primary jurisdiction vested in one of the co-ordinate branches of the government has been inadvertently wrested from it, and transferred to another, where one of the claimants, in view of the outstanding patent, will be compelled to pursue the contest with his adversary, at a great disadvantage."

"It is sufficient for the purposes of this suit that some orher person MAY HAVE a superior right; and that it is the function of the LAND DEPARTMENT to determine that question in the first instance."

In the case at bar, the entry had been suspended—held for cancellation—by the Commissioner and Secretary, pending further hearing and investigation; the primary and ultimate tribunal for the lawful determination of all matters in contraversy was with that department of the government.

While such department is engaged in the judicial determination of that controversy the legislative department usurps its powers; overrules, annuls and disregards its lawful adjudications with reference thereto; and transfers the property to the fraudulent defeated litigant!

Such usurpation and abuse of power cannot be tolerated in this age or land or under our system of government.

It is within the power of the judiciary alone to right so great injustice and to set its seal of condemnation thereon.

There alone can a just government remedy the evil attempted to be thus inflicted upon a citizen claiming rights and privileges secured to him by the supreme law of the land.

That the government owes such duty to its citizens and

that its obligations in this regard can be thus discharged has been frequently so determined by this court even where the citizens' claims or rights were but inchoate or equitable.

In U. S. vs. M. K. & T. Ry., 141 U. S. 358, where patents had been issued to the railway company for lands then occupied by settlers desirous of availing themselves of the homestead and pre-emption laws to secure title thereto, but whose claims were ignored and disregarded by the officers of the Land Department under a misapprehension of the law, Mr. Justice Harlan for the court declared—

"The government was under an obligation to claimants under the homestead and pre-emption laws to undo the wrong alleged to have been done by its officers in violation of law by removing the cloud cast upon its title by the patent in question and thereby enable itself to properly administer these lands, and give clear title to those whose rights may be superior to those of the railway company."

The equitable—not to say—the vested rights of petitioner are clearly recognized by the court in Fresbie vs. Whitney 9 Wall. 187. Mr. Justice Miller for the Court—

If in any case the party asserting successfully his EQUITABLE INTEREST, had not acquired a VESTED RIGHT, in the just sense of that term, the cases are still widely differen- from the one under consideration."

"In all those cases the successful party had established his legal right of preference ofpurchase over the other under the law as it then stood when the land officers decided the case."

"And it was the action of those officers and their disregard of the law, in refusing to the party the benefit of the preference in purchase, which this court corrected by compelling the conveyance of the legal title acquired by this violation of law."

Though as between the government and a land claimant his right may not be vested, yet as between rival claimants to land their respective rights have beenfrequently recognized, declared and enforced as vested.

Cowen vs Shepley 91 U. S. 334

Monroe Cattle Co. vs Becker 147 U. S. 47

When one in good faith initiates a claim to government land in conformity with the act of congress he thereby secures a grant from the government upon conditions specified and limited.

Upon compliance with those conditions he has the lawful pledge of the government that he will receive from it perfect title thereto.

Until codition broken his title or claim cannot be defeated by hostile legislation.

Such ss the law as announced in Farmers H. & T. Co. vs Ch. Ry. 39 Fed. 143.

And in Monroe Cattle Co. vs Becker 147 U. S. 47 with reference to a similar condition of affairs in Texas this court declared, that between rival claimants to State lands the rights were vested and could not be defeated by subsequent legislation.

It is respectfully submitted htat the principles announced in both these cases applies with equal, if not greater force and logic to the case of petitioner.

IV.

The act abrogates vested rights; it is a bill of penalties; it denies to petitioner the equal protection of the laws of his country; and so is void.

We have seen that as between Emblen and the government the rights which he secured were at least contractual; that as between him and Weed they were vested; and that in either event they are under the protecting aegis of the constitution.

Of that instrument this court is the expounder and guardian.

Through the neglect or connivance of various departments of the government more than enough of public property to discharge the national debt many times over, has been wrongfully secured.

The same shameful and corrupt means and influences have so far prevailed in this contest notwithstanding the supreme authority and protest of the Honorable, the Secretary

of the Interior.

But, thank God! in this age of legislative and executive faithlessness and corruption there is yet left to the people one secure and certain refuge—the judiciary of America.

The pecuniary interests involved in this controversy are comparatively insignificant.

As compared with the all powerful and all corrupting influences behind him Mr. Weed is but a name.

But the great underlying principles for the protection of which we invoke the original jurisdiction of this august tribunal are far-reaching and of supreme moment.

Judging from the magnificent record of this court we have as supreme confidence in the result as in the justice of our cause.

Respectfully submitted,

HENRY B. O'REILLY,

Attorney for Petitioner.

Office Supreme Court U. S.
FILED,
DEC 30 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

In Re. Geo. F. Emblen. Original No. 9

Brief for Lincoln Land Co.

S. M. Stockslager,
George C. Heard,
Attorneys for Lincoln Land Co.

PRESS OF N. T. ELLIOTT, WASHINGTON.

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In Re. George F. Emblen. Original. No. 9.

Reply Brief in Behalf of The Lincoln Land Company, of Nebraska, part owner of lands involved.

We beg leave to submit that the real *subject-matter* involved in this application for a mandamus is the land itself, consisting of 160 acres, chiefly covered by a western town.

As shown by the application of mandamus, the land involved has been patented to Weed, the patentee, by a patent of the United States conveying title in fee simple.

Weed and his grantees, therefore, having the legal title to said land under the patent, it is submitted that the United States have no jurisdiction whatever in any proceeding whereby the title can be affected, unless it be by suit or action in a court having competent jurisdiction to set aside said patent and to revest the United States with title to said land.

In Moore *et al.*, *vs.* Robbins, (96 U. S., 530), this honorable court held:

"If any lawful reason exists why the patent should be cancelled or rescinded, the appropriate and only remedy is by a bill in chancery in a court of competent jurisdiction brought by the Government, and there exists no power in the Secretary of the Interior, or any other officer of the Government to reconsider the fact on which the patent issued, or to recall or rescind it, or to issue another for the same land.

But when fraud or mistake or misconstruction of the law of the case exists, the United States, or any contesting claimant for the land, may have appropriate relief in a court of equity."

Therefore, if mandamus should be granted as prayed, against the Secretary of the Interior requiring him to entertain Emblen's contest, the Secretary is wholly without jurisdiction of the subject-matter, *i. e.*, the land, since title has passed from the United States under the patent above mentioned.

Being, therefore, without authority or jurisdiction to entertain a contest in behalf of petitioner for lands not owned by the United States, the doctrine of this court in the Commissioners, &c., *vs.* Loague, Administrator, 129 U. S. 493, applies to defeat this application for mandamus. In that case, the Court held:

"Mandamus lies to compel a party to do that which it is his duty to do without it. It confers no new authority, and the party to be coerced must have the power to perform the act."

The Secretary has no "power to perform the act" while the title to this land is outstanding and not in any sense in the United States, unless the doctrine above referred to in Moore *et al.*, *vs.* Robbins, is to be repudiated, which distinctly holds that the Secretary of the Interior or any other officer of the Government has no power to recall or rescind a patent, or to issue another for the same land, while the first patent is outstanding.

Hence, being powerless to rescind or set aside this patent issued to the patentee and his grantees, the Secretary must be held powerless to proceed, if the mandamus as prayed, should be granted.

Therefore, under the decision above cited, mandamus in such a case, where the person to be coerced has no power to act, will not be granted.

II.

As the application in this case shows, the patentee, Weed, is not the only party in interest in this land, but it has been subdivided into town lots built upon for purposes of trade and business, as well as for other purposes, and as held by the Honorable Secretary, in 17th Land Decisions, page 220, cited in this application, "I am aware that if this entry should be cancelled, many titles may be disturbed, and doubtless some innocent purchasers would suffer."

We submit, therefore, that this honorable court has not the power nor jurisdiction to grant the prayer of petitioner, which is that the patent to this land issued by the United States, be declared

void, and that the act of Congress under which it was issued, be also declared void.

Because this honorable court or any other court administering an enlightened jurisprudence, must decline to render judgment or make orders affecting the rights of persons and property, unless the persons affected and owning said property have had their day in court, and full opportunity for a constitutional defence. The safeguard found in our constitution which provides that no person shall be deprived of life, liberty, or property, without the due process of law, would be set at naught, if this honorable court should, by the order prayed for, destroy the property rights of the citizens of the town of Yuma, to this land, by declaring the patent under which they hold their property, to be null and void, without giving such citizens an opportunity for a full defense in a court of a competent jurisdiction.

III.

In view of the aspersions attempted to be cast upon the House of Representatives and Senate of the United States, by counsel for petitioner, because Congress saw fit to pass the act complained of, under which patent was issued, we append the Report of the House and Senate, adopted by the Public Lands Committees of those two bodies respectively.

S. M. Stockslager,
George C. Heard,
Attys. for The Lincoln Land Co., of Nebraska.

[APPENDIX.]

House of Representatives, Fifty-third Congress, Second Session.
Report No. 1421.

TITLE TO CERTAIN LAND IN YUMA, COLO.

AUGUST 13, 1894.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. MEIKLEJOHN, from the Committee on the Public lands, submitted the following

REPORT:

[To accompany H. R. 7955.]

"The Committee on the Public Lands, to whom was referred the bill (H. R. 5713) to perfect the title to a quarter section of land in the town of Yuma, Colo., the same being the S. E. ¼, section 22, township 2 north, of range 48 west, of the sixth principal meridian, State of Colorado, have had the same under consideration and recommend the passage of a substitute bill herein reported, and that H. R. 5713 lie on the table.

"The facts are as follows: September 19, 1885, George F. Weed made pre-emption cash entry for said land, paying therefor the Government price of $200, and received from the Government officials final receipt therefor.

"Shortly after entry, the tract in question being favorably located and situated for a town site on

the B. & M. R. R., the tract was platted to town lots and laid out as a town site.

"A portion of the tract was sold to the railroad company, which built a station depot and other buildings thereon.

"The Government established a post-office at this town and the town was called Yuma. Town lots were sold rapidly, and within ninety days Yuma was a town of 100 inhabitants.

"The town grew rapidly and in a very short time George F. Weed, who entered the land, had sold and disposed of almost the entire 160 acres to many different purchasers in good faith and for valuable considerations by warranty deeds.

"These innocent purchasers, both resident and non-resident, proceeded to make valuable improvements on these lots and parcels of land, which shortly resulted in building up a town of about 400 inhabitants.

"Early in the year 1887 the town of Yuma was duly organized and incorporated under the laws of the State of Colorado, with mayor, town council, and a full corps of town officers.

"A $6,000 public school building was erected, and the town issued bonds to build same. Also water-works, costing about $12,000, was established and town bonds issued in payment of same.

"Since its incorporation taxes have been levied and collected on the entire tract of land in question for the existence and improvement of the town and to pay the interest upon said bond indebtedness.

The county seat of Yuma County, with its courts and other county business, was duly established in the town of Yuma, built upon this tract, which is and has been the permanent county seat of said county.

"The total valuation of the property of this town built upon this tract of land is assessed by the county officials at $150,000, on which assessment taxes have been regularly collected.

"Considerable of this tract, consisting of lots and blocks and parcels of land, was bought in good faith by non-residents, who invested their money in the erection of blocks of buildings and other lasting and valuable improvements in good faith, relying on the purchase, uncontested at date of their purchase, by Weed from the Government of the United States, as evidenced by the issuance to him of the final receipt of the Government.

"Not until October, 1888, or three years and more after Weed had been allowed to purchase this land by Government officials, did any one attempt to contest or otherwise dispute the validity of Weed's purchase; but in October, 1888, one, George F. Emblen, filed an affidavit of contest in the land office at Denver, charging that the original entryman, Weed, had failed to comply with the pre-emption law as to residence and had otherwise failed to comply with the law before the Government had issued to him his final receipt and the certificate of entry, which certified on its face that he had purchased this land under the pre-emption law and

the B. & M. R. R., the tract was platted to town lots and laid out as a town site.

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would be entitled to patent upon presenting same to the Commissioner of the General Land Office.

"Before this contest was filed, however, and during the three years prior thereto, without any notice to the town authorities or to the county authorities, or to any of the individuals who projected the improvements of said town, erected the schoolhouse, waterworks, and other important improvements, they were permitted and encouraged to believe, by the action of the Government in allowing Weed to make final entry of the land, that the title thereto was perfect and that the Government would not take advantage of their investments and outlays.

"The Government, however, permitted Emblen to contest Weed's entry of this land, and the records of the Interior Department show that there were two hearings or trials had before the local office in Colorado, which covered a period of two years, and in November, 1890, the register and receiver of the local land office dismissed Emblen's contest and found that Weed's entry was valid.

"May, 1891, the General Land Office, on appeal, also found in Weed's favor, holding that he had complied with the law.

"January, 1893, on appeal and review of the Commissioner's decision, the Secretary of the Interior, after an exhaustive examination of all the facts and law bearing on the case, decided in favor of Weed's entry as follows:

"'Upon the evidence submitted at the two hearings, I have no hesitancy in finding that Weed made his settlement and filing in good faith, and that he complied with the law as to residence and improvements.

'"I am also satisfied that he did not cause and allow said lands to be built upon as a town site and use the same for purposes of trade prior to his entry, as charged by Emblen.'"

"This decision is found in volume 16, Land Decisions, p. 28.

"Notwithstanding this final decision in favor of Weed's title to this town property, which, owing to the usual delays, was not rendered until over four years after the contest was filed, Emblen, the contestant, filed additional papers asking for a rehearing of the case involving new trials before the register and receiver, Commissioner of the General Land Office, and Secretary of the Interior.

"The Secretary of the Interior in August 1893, or nearly eight years after the Government had sold the land to Weed, and after five years of fruitless contest and litigation against Weed's entry, and after concurring decisions of the register and receiver, Commissioner of the General Land Office, and of the Secretary of the Interior, holding that Weed had fully complied with the law in every respect, granted Emblen's request for another opportunity to contest Weed's rights to this land upon identically the same charges as contained in the original contest.

"This order of the Secretary for a rehearing remains of record, but is still unexecuted.

"This committee finds as a result of its examination of all the records in the case—

"First. That the inhabitants and property-owners of the town of Yuma, involved in the above contest, purchased their property from Weed after final entry by him from the Government; that he had prima facie right to sell; that they purchased before any contest or dispute arose effecting their grantor's title; that they have suffered incalculable injury in business and property from the cloud imposed on their titles by the pendency of the contest already had covering a period of nearly five years.

"Second. That another contest upon the same charges, which, in all probability, will last several years longer, can only work greater hardship, the prolongation of which will utterly destroy the business growth and prosperity of this unfortunate town.

"Third. We find that the Government alone is interested in this second contest, since the contestant, George F. Emblen, has filed formal relinquishment of his right to enter said land as a successful contestant in case the second contest should be decided in his favor.

"Fourth. We find also that even though the entry of Weed should be canceled under the present proceedings, neither the contestant nor anyone else would be permitted to enter the land covered by this town for private purposes, since public lands settled upon and used for town purposes are not subject to entry under the public-land laws, except for such purposes.

"Fifth. We find also that the titles of persons who have purchased in good faith from the original entryman, Weed, can be protected and preserved best by the Government confirming and patenting to Weed the legal title to said tract, through which title conferred on Weed his tranferrees would be secured through his conveyances to them long since made.

"Sixth. The committee is therefore of the opinion that the United States, having sold this tract of land to Weed in September, 1885, and received the sum of $200, the Government price therefor, and having, at the instance of the contestant, prosecuted a contest against the legality of said entry for a period of nearly five years, which resulted in the concurring decisions before referred to fully sustaining the validity of said entry, it is neither just to the innocent purchasers involved nor expedient for the Government to further prosecute said contest.

"Therefore, the committee recommends that Weed's entry be confirmed and patented by the United States, to the end that the inhabitants of the town of Yuma may have their titles settled and further harrassment cease.

Office Supreme Court U. S.
FILED.
JAN 2 1896
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

No. 735.

CHEMICAL NATIONAL BANK OF CHICAGO,
Plaintiff in Error,
vs.
HARTFORD DEPOSIT COMPANY,
Defendant in Error.

Error to Supreme Court of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

HIRAM T. GILBERT,
FOR PLAINTIFF IN ERROR.

BARNARD & MILLER, PRINT., CHICAGO.

IN THE

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Defendant in Error.

Error to the Supreme Court of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

MAY IT PLEASE THE COURT:

This was a suit brought by the Hartford Deposit Company against the Chemical National Bank of Chicago and its receiver, in the Superior court of Cook county, Illinois. It presents for decision the question whether, in the case of a lease to a national banking association of a banking-room for a term of years, which term has not expired, the lessor can recover against such association or its receiver for rent accruing under the lease subsequent to its insolvency and the appointment of a receiver to close up its business under the national banking laws, and after the receiver has abandoned or surrendered up the leased property to the lessee.

The question thus presented arises out of undisputed facts which, as set forth in the agreed statement (Printed Record, pp. 10–39) upon which the case was submitted for decision to the trial court, are in substance as follows:

The Chemical National Bank was duly organized as a national banking association under the laws of the United States, and was duly authorized to commence, and did commence the business of banking on the 15th day of December, 1891, and continued to carry on its banking business until the 8th day of May, 1893. On the 18th day of November, 1892, it leased, by a lease in writing, from the Hartford Deposit Company, a banking-room in the building owned by the latter and situated at the south-west corner of Madison and Dearborn streets, in Chicago. The term fixed by the lease was five years, commencing May 1, 1893, and ending April 30, 1898. The total rental was fixed at $62,000, of which $2,500 was paid at the date of the lease, and the remainder was made payable in monthly installments of $1,000 each on the first day of each month of the term. The lease contained the provisions usually inserted in leases of similar property in Chicago, among which was one that in case of the abandonment of the premises by the lessee, the lessor might re-let without prejudice to its rights against the lessor, collect the rents under such re-letting, credit the lessee with the proceeds and hold it liable for the balance, and another that in case of a breach by the lessee of any of its covenants, or in case of its insolvency, the lessor might terminate the lease.

On or about the 1st day of May, 1893, the Chemical National Bank took possession of the rooms in question, and continued to retain possession under the lease until the 9th day of May, 1893, on which last mentioned date, having

become insolvent, it suspended business and the payment of its obligations, and said rooms and all the bank's assets were taken possession of by a national bank examiner under the direction of the Comptroller of the Currency of the United States, and said national bank examiner retained possession of said rooms and of said assets until the 21st of July, 1893, when he delivered possession thereof to John P. Hopkins, as receiver of said Chemical National Bank, who had on said date been duly appointed as such receiver by the Comptroller of the Currency of the United States, under and in pursuance of the laws of the United States, and Hopkins, as such receiver, retained possession of said rooms until the 31st day of July, 1893, on which date he abandoned the same as hereinafter stated.

On the 27th day of July, 1893, Hopkins served upon the Hartford Deposit Company a notice in writing that he had been appointed receiver, and that as such receiver he had elected to terminate the lease in question, and that he would vacate the premises on the 31st day of July, 1893, and that after that time, so far as he, as receiver, was concerned, said lease would be terminated.

On the same day the receiver and the Hartford Deposit Company entered into an agreement in writing that the furniture and fixtures of the Chemical National Bank might remain in the rooms until the Deposit Company should notify Hopkins to remove the same, said furniture and fixtures to remain with the express understanding that said Deposit Company should have all the rights, but no other, against the receiver, against the Chemical National Bank and against the stockholders of the Chemical National Bank and each of them, that it would have in case the receiver were to actually remove the furniture from the rooms on the 31st day of July, 1893.

In accordance with said notice Hopkins, as receiver, abandoned possession of the rooms on the 31st day of July, 1893, and in pursuance of said agreement the furniture and fixtures of the Chemical National Bank continued to remain in the rooms until the commencement of this suit. On the 27th day of July, 1893, Hopkins, as receiver, paid to the Deposit Company $2,709.68, being the total amount of rent then due from the Chemical National Bank and the receiver to the Deposit Company under the lease down to and including the 31st day of July, 1893.

On the 15th day of January, 1894, Hopkins having resigned his office as receiver, E. C. Tourtelot, was by the Comptroller of the Currency duly appointed receiver and entered upon the discharge of his duties as such receiver, and has ever since continued to act and is still acting as such receiver.

It was agreed between the parties that if, upon the foregoing facts, the court should be of the opinion that the plaintiff was entitled to recover of the defendants, or either of them, judgment should be rendered in favor of the plaintiff and against one or both of the defendants as the case might be, said judgment to be in such form as the law might require, and to be for such sum as the court should, from the foregoing facts, determine the plaintiff to be entitled to recover, but that if, on the other hand, the court should be of the opinion that the plaintiff was not entitled to recover of the defendants or either of them judgment should be rendered in favor of the defendants and against the plaintiff for costs of suit.

At the trial it was insisted on behalf of the defendants, and the trial court held, that the following propositions of law obtained in the case and precluded a recovery by the plaintiff:

First. The appointment of a receiver of a national banking association by the comptroller of the currency on account of its insolvency, amounts, for all practical purposes, to the dissolution of such association.

Second. A claim to be entitled to be proven up and paid by dividends out of the assets of a national banking association in the hands of a receiver must be one which, at the date of the suspension of the association, was an existing demand and the claim for rent under this lease is not such a demand.

Third. After the appointment by the comptroller of the currency of a receiver of a national banking association no judgment can be rendered against such association or its receiver for any claim which, at the date of the bank's suspension, was not an existing demand.

Accordingly the trial court entered a finding and judgment in favor of the defendants. An appeal having been prosecuted to the Appellate Court of the First District the judgment of the trial court was affirmed as to the receiver, but reversed as to the Chemical National Bank, and a judgment for $9,000 against it was rendered by the Appellate Court. From that judgment an appeal was prosecuted by the Chemical National Bank to the Supreme Court of Illinois which affirmed the judgment of the Appellate Court.

The present writ of error is prosecuted for the purpose of bringing before this court for review the judgment of the Supreme Court of Illinois, and the errors assigned upon the record are the following:

First. The Supreme Court of Illinois erred in affirming the judgment of the Appellate Court of the First District.

Second. The Supreme Court of Illinois erred in not reversing the judgment of the Appellate Court of the First District and in not affirming the judgment of the Superior Court of Cook County.

Third. The Supreme Court of Illinois erred in holding that under the agreed statement of facts in the record the plaintiff in error was liable to the defendant in error.

BRIEF.

I.

The appointment of a receiver of a National Banking association by the comptroller of the currency on account of its insolvency amounts, for all practical purposes, to the dissolution of such association.

Fidelity S. D. & T. Co. v. *Armstrong*, 35 Fed. Rep., 567.

Bank of Bethel v. *Pahquioque Bank*, 14 Wall., 383.

White v. *Knox*, 111 U. S., 784.

Revised Statutes U. S., Secs. 5,141, 5,151, 5,191, 5,195, 5,201, 5,205, 5,234, 5,235, 5,236, 5,239.

Sec. 1 Act of Congress of June 30, 1876, Pratt's Digest, 120.

II.

A claim to be entitled to be proven up and paid by dividends out of the assets of a National banking association in the hands of a receiver must be one which, at the date of the suspension of the association, was a then existing demand, and the claim for rent under this lease is not such a demand.

Riggin v. *Magwire*, 15 Wall., 549.
French v. *Morse*, 2 Gray, 111, 115.
Savory v. *Stocking*, 4 Cush., 607.
Dean v. *Caldwell*, 127 Mass., 242.
White v. *Knox*, 111 U. S., 784.
Fidelity S. D. & T. Co. v. *Armstrong*, 35 Fed. Rep., 567.
Chemical Nat. Bank v. *Armstrong*, 59 Fed. Rep., 372.

III.

After the appointment by the comptroller of the currency of a receiver of a National banking association judgment cannot be rendered against such association, or its receiver, for any claim which, at the date of the bank's suspension, was not an existing demand.

Bank of Bethel v. *Pahquioque Bank*, 14 Wall., 383.
White v. *Knox*, 111 U. S., 784.
Rev. Stat. U. S., Sec. 5,235 and 5,236.

ARGUMENT.

I.

THE APPOINTMENT OF A RECEIVER OF A NATIONAL BANKING ASSOCIATION BY THE COMPTROLLER OF THE CURRENCY ON ACCOUNT OF ITS INSOLVENCY AMOUNTS, FOR ALL PRACTICAL PURPOSES, TO THE DISSOLUTION OF SUCH ASSOCIATION.

If prior to the 30th day of July, 1893, the Chemical National Bank of Chicago had been dissolved and its franchises declared forfeited by the decree of a court of competent jurisdiction, it would not be contended that the present suit could have been maintained, or that the plaintiff could have established any claim against the receiver or against the assets in his hands, for, had such dissolution and forfeiture taken place, there would have been no corporation in existence with whom the Hartford Deposit Company could have dealt with respect to the lease in question during the period for which it now claims rent. Such was the ruling of the court in *Fidelity Safe Deposit & Trust Co.* v. *Armstrong*, 35 Fed. Rep., 567. The facts in that case were as follows:

On March 1, 1886, the Deposit and Trust Company and the Fidelity National Bank executed a lease by which the former leased to the latter banking rooms in Cincinnati for twenty years from the date of the lease, at an annual rental of $5,600, payable in monthly installments at the end of each month. The bank entered into possession under the lease, and continued in possession until June 20, 1887, when the Comptroller of the Currency

took possession of the property and assets of the bank, and the bank suspended operations. On June 27, 1887, a receiver was appointed by the Comptroller, and said receiver thereupon entered into possession of the property of the bank, which possession was continued to the time of the commencement of the suit. On June 30, 1887, the Comptroller of the Currency instituted proceedings in the Circuit Court of the United States which resulted in a decree of that court, on July 12, 1887, forfeiting the charter of the bank. The receiver refused to take possession of the banking rooms under the lease, or to pay the rent, and the Deposit and Trust Company, accordingly, after the charter of the bank had been forfeited, filed its bill against the receiver praying that the receiver might be required to withhold from the assets in his hands the sum of $50,000 to meet the damages from month to month accruing to the complainant, or that the cash value of the complainant's damages might be ascertained and he be allowed to prove a claim therefor. In deciding the case the court, among other things, said:

"As to the claim for damages by reason of the receiver "—of the defendant—refusing to take under the contract "and pay the rent, it is settled by all the authorities "that the receiver was not bound to take possession. "He had his election to take or not to take. If satisfied "that the lease was valuable as an asset of the bank, he "might take possession, and, having taken possession, "would be liable for the payment of the rent; but if "satisfied that the lease was of no value, and that it "would be of no interest to the trust—to the creditors— "he might refuse to take possession.

"The claim of the complainant, however, was argued "upon the hypothesis that the case was to be regarded

" as a breach of the contract by the Fidelity National " Bank to pay rent, for which a claim might be proven " against the receiver. The difficulty is that during the " existence of the bank, and up to the time when the " receiver took possession, there was no breach. The " rent was payable at the end of each month; and it " was paid for the entire time that the bank was actually " in occupation of the premises. The bank ceased to " occupy the premises on the 20th day of June, 1887; " the defendant was appointed receiver on the 27th day " of June, 1887, and entered into and took possession of " all its property. The default occurred later. On the " 12th of July, 1887, the charter of the Fidelity Bank " was forfeited, and the bank thereby passed out of ex- " istence, and this complainant ceased to have any party " with whom to deal in reference to that contract; and " the lease was necessarily terminated, because the lessee " had ceased to exist, and had no successors, who, in " the eye of the law, stood in its place. Now, if there " had been a default at the time of the appointment of " the receiver, and of his taking possession of the prem- " ises, that claim might have been proven against the " receiver. But there was no such claim. The claim is " subsequent; and it was held in *Deane* v. *Caldwell*, 127 " Mass., 242, decided by Chief Justice GRAY, now of " the Supreme court, that 'before the date at which " rent is covenanted to be paid it is in no sense " a debt; it is neither *debitum* nor *solvendum*, for " if the lessee is evicted before that day, it never be- " comes payable. It is not within the provision of a " bankrupt act, allowing '" uncertain or contingent de- " mands'" to be proved against the estate of a bankrupt, " because it is not an existing demand, the cause of ac-

"tion on which depends upon a contingency, but the "very existence of the demand depends upon a con- "tingency.' But it was contended by the complainant "that as, in that case, the claim might be set up against "the bankrupt himself, notwithstanding his discharge in "bankruptcy, and as in this case the Fidelity National "Bank was, to use the expression of counsel, 'cremated,' "or rather, stricken out of existence, by the forfeiture "of its charter, and the receiver has taken possession of "all the assets and property, and has instituted a suit "against the directors to enforce their liability, or al- "leged liability, for negligence in the administration of "the affairs of the bank, and proposes to appropriate all "that can be realized from the individual liability of the "stockholders, and leave nothing in any direction to "which this complainant can look, that this case ought "to be an exception. The answer is that all these pro- "ceedings of the receiver are in strict conformity with "the statute, which was in force at the time this lease "was made, and which this complainant was bound to "recognize. And, having failed to provide against the "contingency that has arisen, he is not entitled to the "relief which he seeks by this bill of complaint. The "demurrer, therefore, will be sustained, and the bill dis- "missed."

The only point of difference between the case cited and the one at bar is, that there the charter of the bank had been declared forfeited by judicial decree, while here no proceedings for the forfeiture of the bank's charter have ever been instituted. It becomes important, therefore, to consider whether, under the provisions of the national banking law, the appointment of a receiver of a national banking association by the Comptroller of the

Currency does not have the same effect upon its outstanding executory contracts as would its dissolution by judicial decree.

In the determination of this question, it is necessary to consider the various provisions of the national banking law governing the organization of national banking associations and providing for the appointment of receivers to close them up.

By the national banking laws the Comptroller of the Currency is given supervisory power and jurisdiction over all national banks, and is authorized in certain cases to appoint receivers, whose duty it is to take possession of the property and assets of such associations and close them up. This power of appointing receivers is one confided exclusively to the discretion of the Comptroller of the Currency, and with that discretion the courts are powerless to interfere.

Washington National Bank v. *Eckels*, 57 Fed. Rep., 870.

Section 1 of the act of Congress approved June 30, 1876, (Pratt's Digest, page 120), provides as follows:

"That whenever any national banking association "shall be dissolved, and its rights, privileges, and fran- "chises declared forfeited, as prescribed in Section 5,239 "of the Revised Statutes of the United States, or when- "ever any creditor of any national banking association "shall have obtained a judgment against it in any court "of record, and made application, accompanied by a "certificate from the clerk of the court stating that such "judgment has been rendered and has remained unpaid "for the space of thirty days, or whenever the comp- "troller shall become satisfied of the insolvency of the

" national banking association, he may, after due exam-
" ination of its affairs, in either case appoint a receiver,
" *who shall proceed to close up such association*, and en-
" force the personal liability of the shareholders, as pro-
" vided in Section 5234 of said statutes."

Section 5238 of the Revised Statutes of the United States provides as follows :

" SECTION 5234. On becoming satisfied, as specified
" in sections 5226 and 5227, that any association has
" refused to pay its circulating notes as therein mentioned,
" and is in default, the comptroller of the currency may
" forthwith appoint a receiver, and require of him such
" bond and security as he deems proper. Such receiver,
" under the direction of the comptroller, *shall take pos-*
" *session of the books, records and assets of every de-*
" *scription of such association, collect all debts, dues,*
" *and claims belonging to it, and, upon the order of a*
" *court of record of competent jurisdiction, may sell or*
" *compound all bad or doubtful debts, and, on a like*
" *order, may sell all the real and personal property of*
" *such association, on such terms as the court shall di-*
" *rect; and may, if necessary to pay the* DEBTS *of such*
" *association, enforce the individual liability of the*
" *stockholders. Such receiver shall pay over all money*
" *so made to the treasurer of the United States, subject*
" *to the order of the comptroller*, and also make report
" to the comptroller of all his acts and proceedings."

In addition to the foregoing provisions for the appointment of a receiver by the comptroller of the currency he is authorized to make such appointment (1) if the capital of an association is reduced below the minimum allowed by law and not restored within thirty days (Sect. 5141), (2) if an association fails to make up a deficiency in its sur-

plus fund (Sect. 5151), (3) if it fails to make good its reserve (Sect. 5191), (4) if it fails to select a redemption agent and redeem its notes (Sect. 5195), (5) if it fails to sell stock it has purchased or acquired (Sect. 5201), or (6) if it fails to pay up its capital stock or go into liquidation (Sect. 5205). In each of these cases, as well as in cases of non-payment of a judgment, insolvency and refusal by an association to pay its circulating notes, the power of the comptroller is discretionary and not subject to review by the courts.

Washington Nat. Bank v *Eckels*, 57 Fed. Rep., 870.

It is only in the case of wilful violation of law provided for in Sect. 5239 that the action of the comptroller is required to be preceded by judicial proceedings. That section is as follows:

"If the directors of any national banking association "shall knowingly violate or knowingly permit any of "the officers, agents or servants of the association to "violate any of the provisions of this title, all the rights, "privileges and franchises of the association shall be "thereby forfeited. Such violation shall, however, be "determined and adjudged by a proper Circuit, District, "or Territorial court of the United States in a suit "brought for that purpose by the comptroller of the "currency, in his own name, before the association "shall be declared dissolved. And in case of such "violation, every director who participated in or as-"sented to the same shall be held liable in his per-"sonal and individual capacity for all damages which "the association, its shareholders or any other per-"son, shall have sustained in consequence of such vio-"lation."

Sections 5235 and 5236 of the Revised Statutes provided as follows:

"SECTION 5235. The comptroller shall, upon appointing a receiver, cause notice to be given, by advertisement in such newspaper as he may direct, for three consecutive months, calling on all persons *who may have claims* against such association, to present the same, and to make legal proof thereof."

"SEC. 5236. From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver *on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction*, and as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; *and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.*"

From these provisions of the national banking law, it appears that the results of the appointment of a receiver are the following:

1. That such association is closed.

2. That its assets are converted into money.

3. That the money realized from the assets is paid into the treasury of the United States.

4. That the receiver may enforce the liability of the stockholders, if necessary to pay the debts of the association.

5. That of the money realized, a ratable dividend is to be made on all claims proven to the satisfaction of the comptroller or adjudicated in a court of competent jurisdiction.

6. That if any money remain after the payment of claims and expenses, it is to be paid over to the shareholders in proportion to their stock.

These results are the same, whether the appointment of the receiver is or is not preceded by a judicial decree dissolving the corporation. Indeed, from a consideration of the provisions of the national banking act above referred to, it is quite apparent that Congress intended to and did give to the comptroller of the currency full and absolute power to appoint receivers for and close up national banking associations for the various causes above specified, excepting that in the case of a wilful violation by the association of the provisions of the law the comptroller, before proceeding to appoint a receiver and close up the association on account of such violation, must procure an adjudication by a circuit, district or territorial court of the United States that such violation has occurred.

In fact, Congress has, for the purpose of carrying out the provisions of the national banking law, conferred upon the comptroller, excepting in the case last referred to, powers of a judicial character almost as extensive for the purpose of winding up and distributing the assets of national banking associations as that possessed by courts of chancery with respect to other corporations. So far as the determination of the question whether a receiver shall be appointed and the association wound up is concerned, no decree of a court of chancery could be more

effective than the simple appointment by the comptroller of a receiver for any of the causes mentioned in the national banking laws.

Aside from the right given a claimant, whose claim has been rejected by the comptroller, to have the same adjudicated by a court of competent jurisdiction, and the requirement of an order of court before a sale or compounding of bad or doubtful debts or a sale of real or personal property, the power conferred upon the comptroller by the provisions of the national banking law above referred to is quite as extensive as that conferred upon courts of equity in Illinois by Section 25 of the corporation act, which provides that "Courts of equity shall "have full power, on good cause shown, to dissolve or "close up the business of any corporation, to appoint a "receiver therefor, who shall have authority by the name "of the receiver of such corporation (giving the name) "to sue in all courts and do all things necessary to clos-"ing up its affairs as commanded by the decree of such "court."

In view of these provisions of the national bank law, what possible reason is there for making any distinction, so far as the rights of a claimant are concerned, between a case where the national banking association is dissolved by judicial decree and one where, without its being dissolved by such decree, its business is forever stopped and its assets distributed among its creditors and stockholders? Can there be any sound reason for holding that the wilful violation by a national banking association of the provisions of the national banking act, notwithstanding such association may be solvent and able to pay both its creditors and stockholders in full, shall, when such violation has been determined by judicial de-

cree, terminate its liability under a lease, while on the other hand the insolvency of such association resulting in the appointment of a receiver and its being forever closed up, shall not affect such liability, but such lease shall continue in full force and effect as though such insolvency and appointment of a receiver had never occurred? To so hold, we respectfully submit, would be contrary to all reason.

The only proper view, it seems to us, that can be taken of the proceedings provided for by the statutes referred to is that they are quite as effectual for ending the business capacity of a corporation as would be a technical dissolution of its corporate existence by a judgment in *quo warranto* or a decree in equity.

But the Supreme court of Illinois, in their opinion (Rec., 51), among other things, say:

"If Congress intended that the mere act of appointing "a receiver on the part of the comptroller should forfeit "the charter of a national bank and work a dissolution "of the corporation, surely that deliberate body would, "in the enactment of the law, have used language indi- "cating an intention of that character."

And after quoting Section 5239 of the Revised Statutes, the court (Rec., 56), further say:

"If a judgment of a court is necessary to dissolve a "corporation on the grounds specified in the foregoing "section, upon what principle can a judgment be dis- "pensed with when some other ground of forfeiture is "relied upon? But disregarding other reasons, a suffi- "cient answer to the position of counsel is the banking "act nowhere provides that the appointment of a re- "ceiver shall work a dissolution of the charter of a bank-

" ing association. It is not pretended that the appoint-
" ment of a receiver for an ordinary corporation will
" operate as a dissolution of such a corporation, and in
" the absence of an act of Congress providing otherwise,
" we perceive no reason why one rule should be applied
" to an insolvent national bank and a different rule ap-
" plied to other insolvent corporations. In the absence
" of a statute or act of Congress, all insolvent corpora-
" tions should stand on the same footing."

It seems to us that this reasoning is justly obnoxious to the objection that it attaches greater weight to the form than to the substance of the legislation of Congress. It is quite true that the national banking act does not, in express terms, provide that the appointment of a receiver shall work a dissolution of the charter of a banking association, but it is equally true that the provisions for the closing up of a national banking association through the appointment of a receiver by the comptroller of the currency quite as effectually works a distribution of its assets and an end of its business capacity as would a judgment in *quo warranto* or a decree in equity dissolving the corporation. The end reached is precisely the same in either case, notwithstanding the means prescribed for attaining that end are different.

Besides there is a material difference between the effect of the appointment by a court of equity of a receiver for an ordinary corporation and the appointment by the comptroller of the currency of a receiver for a national banking association. In the former case the appointment may be merely for a temporary purpose. But even if otherwise, and it be followed by a distribution of the assets of the corporation, without its actual dissolution, it will not necessarily prevent its carrying on business in

cree, terminate its liability under a lease, while on the other hand the insolvency of such association resulting in the appointment of a receiver and its being forever closed up, shall not affect such liability, but such lease shall continue in full force and effect as though such insolvency and appointment of a receiver had never occurred? To so hold, we respectfully submit, would be contrary to all reason.

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Besides there is a material difference between the effect of the appointment by a court of equity of a receiver for an ordinary corporation and the appointment by the comptroller of the currency of a receiver for a national banking association. In the former case the appointment may be merely for a temporary purpose. But even if otherwise, and it be followed by a distribution of the assets of the corporation, without its actual dissolution, it will not necessarily prevent its carrying on business in

the future. But with respect to a national banking association, Section 5136 of the Revised Statutes prohibits it, in the first instance, from commencing the transaction of business until it has been authorized by the comptroller of the currency to commence the business of banking, and this the controller is, by Section 5140, prohibited from doing until at least fifty per cent. of the capital stock has been paid in. Other provisions of the Revised Statutes, as well as the very nature of the business for which it is organized, renders it impossible for such associations to carry on business after the appointment of a receiver and the distribution of its assets. In short, the provisions of law regulating its organization, the carrying on of its business, and its closing up by the distribution of its assets through a receiver appointed by the comptroller, are such as to render it absolutely impossible, after such distribution of its assets, to carry on the business for which it was organized.

The argument that, because Section 5239 especially provides for a forfeiture of all the rights, privileges and franchises of the association through a judicial proceeding in the case of certain violations of the law therein prescribed, indicates that the closing up of an association through a receiver appointed by the comptroller, without a judicial judgment or decree, was not intended to work a dissolution of the corporation, though plausible, is, when the entire section is considered, wholly without force. The last clause of the section, as will be seen, imposes upon every participating or assenting director, personal liability for damages resulting from the violation of the law, which the section declares a ground of forfeiture. And the requirement that such cause of forfeiture should be established through a judicial proceeding, was

manifestly intended merely to accomplish the purpose of an adjudication respecting such violation, which should form the basis of a suit to establish the personal liability of the director.

Nor is it of any consequence that, in the one case, the dissolution of the corporation is accomplished by a judicial decree preceding the appointment of the receiver, while in the other case such dissolution occurs as the result of the appointment of the receiver and the distribution of the assets, and that, until such final distribution, the corporation continues to exist for the purpose of suing and being sued, for, as we shall endeavor to show hereafter by reference to *Bank of Bethel* v. *Pahquioque Bank*, 14 Wallace, 383, and *White* v. *Knox*, 111 U. S., 784, such capacity to sue and be sued continues only for the purpose of suits necessary for the winding up of the affairs of the association, and upon its final closing up wholly ceases to exist.

II.

A CLAIM TO BE ENTITLED TO BE PROVEN UP AND PAID BY DIVIDENDS OUT OF THE ASSETS OF A NATIONAL BANKING ASSOCIATION MUST BE ONE WHICH, AT THE DATE OF THE SUSPENSION OF THE ASSOCIATION, WAS A THEN EXISTING DEMAND, AND THE CLAIM FOR RENT UNDER THIS LEASE IS NOT SUCH A DEMAND.

The first question to be considered is: What is the nature of the claim presented by the plaintiff for adjudication in this suit?

By the lease the rent, aside from that which was made payable and was paid at the date of the lease, was fixed at $1,000 per month, payable in advance on the first day

of each month (Rec., 23), and numerous covenants were entered into by the lessee, such as that against assignment of the lease or sub-letting, against the use of stoves, kerosene, etc., for the surrender of possession at the end of term, and others usually found in leases of similar character. With respect to the remedies of the lessor, aside from the one by an ordinary suit at law for the recovery of the rent, the lease contains the following provisions:

1. In case of the abandonment of the premises by the lessee, the lessor may re-let, without prejudice to its rights against the lessee, collect the rents under such re-letting, credit the lessee with the proceeds, and hold it liable for the balance. (Rec., 26.)

2. In case of a breach by the lessee of any of its covenants, or in case, among other things, of the lessee's becoming insolvent, or making an assignment for the benefit of creditors, the lessor may re-enter, expel the lessee and those claiming under it, and terminate the lease. (Rec., 29, 30.)

It does not appear from the agreed statement of facts that there has been any re-letting of the premises by the lessor; nor is any claim made of a right to recover because of any such re-letting resulting in a deficiency after the application of the proceeds thereof; nor is it shown or claimed that there has been any election on the part of the lessor to re-enter and terminate the lease. On the contrary, the claim sought to be established by the agreed statement of facts is purely one for the rent stipulated in the lease for the months of August, 1893, to April, 1894, both inclusive, amounting in all to $9,000, being the amount of the judgment rendered in favor of the plaintiff by the Appellate Court.

It will also be perceived that, by reason of the provision in the lease permitting the lessor to re-enter and terminate the lease in case the lessee should become insolvent, the insolvency of the bank and its consequent suspension of business, and the appointment of the receiver, transformed the lease, which had theretofore been a contract absolutely binding upon the lessor, into one the performance of which on its part was from thenceforth purely optional. Consequently, whether the lessor would thereafter have any claim against the lessee by reason of the covenants of the lease, and, if it did, what the nature and extent of that claim would be, was wholly uncertain, and depended entirely upon the manner in which the lessor should thereafter exercise the election given it by the lease, either (1) to treat the tenancy of the lessee as continuing and collect the rent stipulated in the lease, or (2) to re-let and collect from the lessee the deficiency, or (3) to absolutely terminate the lease.

Such being the nature of the plaintiff's claim, was it one which he was entitled to prove up and receive payment of by dividends out of the assets in the hands of the receiver?

In *Riggin* v. *Magwire*, 15 Wall., 549, the question arose whether, for a breach of covenant that the grantor has an indefeasible estate in fee in land sold, the claim arising from the right of his wife, yet living, to be endowed of the estate, was one which could be proven up against a bankrupt's estate under the fifth section of the bankrupt act of 1841, which provides, as follows:

"All creditors whose debts are not due and payable "until a future day, all annuitants, holders of bottomry "and *respondentia* bonds, holders of policies of insur-

"ance, sureties, indorsers, bail or other persons having "uncertain or contingent demands against such bankrupt "shall be permitted to come in and prove such debts "and claims under the act, and shall have a right, when "those debts or claims become absolute, to have the "same allowed them; and such annuitants and holders "of debts payable in future may have the present value "thereof ascertained under the direction of such court "and allowed them accordingly as debts *in praesenti*."

Mr. Justice BRADLEY, in delivering the opinion of the court, said:

"It is argued that under the right given by the fifth "section of the Bankrupt Act of 1841 to prove 'uncer-"tain and contingent demands,' the claim in this case "could have been proven under the act, but the better "opinion is that as long as it remains wholly uncertain "whether a contract or engagement would ever give rise "to an actual duty or liability, and there was no means "of removing the uncertainty by calculation, such con-"tract or engagement was not provable under the act of "1841. See 1 Smith's Leading Cases, 1137, notes to "*Mills* v. *Auriol* by Hare. In 1843 Martin Thomas "was still living and there was no certainty that his wife "would ever survive him. It was uncertain whether "there would ever be any claim or demand. On what "principle, then, could the covenant have been liqui-"dated or reduced to present or probable value? If an "action at law had been brought on the covenant at "that time nominal damages at most, if any damages at "all, could have been recovered. It did not come within "the category of annuities and debts payable in future "which are absolutely existing claims. If it had come "within that category the value of the wife's probability

" of survivorship after the death of her husband might " have been calculated on the principle of life annuities. " Had a proposition for a compromise of her right been " made between her and the owner of the land, such a " mode of estimation would have been very proper. " But without the authority of the statute the assignee " would not have been justified in receiving such an esti- " mate and making a dividend on it.

" It is unnecessary to review the authorities *pro* and " *con* on the subject. They are quite numerous and are " mostly cited in the note of Mr. Hare, above referred " to. The case is so clear that we have hardly enter- " tained a doubt about it."

In *French* v. *Morse*, 2 Gray, 111, 115, a similar question arose with respect to a claim arising on a covenant against incumbrances in a deed conveying land, and Mr. Justice METCALF, in delivering the opinion of the court, among other things, said:

" In the present case the defendant's covenant against " incumbrances on the land conveyed by him to the " plaintiff was not, until after the defendant's discharge, " so broken as to give the plaintiff a cause of action " thereon against him for actual damages. Whether " such cause of action would ever exist was uncertain " and contingent at the time when the defendant went " into bankruptcy, and also at the time when he was dis- " charged. At neither of those times had the plaintiff " any existing demand upon which the cause of action " depended on a contingency; but the very existence of " his demand depended on a contingency."

In *Savory* v. *Stocking*, 4 Cush., 607, the question arose whether a discharge in bankruptcy taking effect

"ance, sureties, indorsers, bail or other persons having "uncertain or contingent demands against such bankrupt "shall be permitted to come in and prove such debts "and claims under the act, and shall have a right, when "those debts or claims become absolute, to have the "same allowed them; and such annuitants and holders "of debts payable in future may have the present value "thereof ascertained under the direction of such court "and allowed them accordingly as debts *in praesenti*."

Mr. Justice BRADLEY, in delivering the opinion of the court, said:

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June 28, 1842, was a bar to the recovery of a quarter's rent falling due on July 9th following, the bankrupt having occupied the premises to the end of the quarter. In delivering the opinion of the court Mr. Justice FLETCHER, among other things, said:

"The discharge in bankruptcy does not discharge this "claim, and the plaintiff must have judgment for one "quarter's rent. The petition in bankruptcy was on the "28th of June, 1842. The quarter under the lease ex- "pired and the rent for the quarter now claimed became "due on the 9th of July, 1842. This was not a debt "due at the time of the discharge, nor was it a contin- "gent debt within the meaning of the bankrupt law, be- "cause the claim is in part for the occupancy of the "premises by the bankrupt after the discharge, and "though that part be but a small part, it does not affect "the principle. The assets of the bankrupt cannot be "charged for the occupancy of the bankrupt after the "time of the discharge."

In *Deane* v. *Caldwell*, 127 Mass., 242, the question arose whether a lessor was entitled to prove a claim for rent against the insolvent estate of a deceased lessee under a statute which provided in general terms for the appointment of commissioners "to receive and examine "all claims of creditors against the estate, and to return "a list of all claims laid before them with the sum "allowed on each claim," and which further provided that "every creditor of an insolvent estate who does not "present his claim for allowance in the manner herein "specified shall be barred from recovering the same un- "less further assets of the deceased come to the hands "of the executor or administrator after the decree of "distribution." In delivery the opinion of the court, Mr. Chief Justice GRAY, among other things, says:

"Before the day at which rent is covenanted to be "paid it is in no sense a debt; it is neither *debitum* nor "*solvendum*; for if the lessee is evicted before that day "it never becomes payable. It is not within the provis- "ion of a bankrupt act allowing 'uncertain or contingent "demands' to be proved against the estate of a bank- "rupt, because it is not an existing demand, the cause "of action on which depends upon a contingency, but "the very existence of a demand depends upon a con- "tingency."

These authorities seem to us to conclusively show that a claim for rent such as that sued on in the case at bar is not one which can be proven up and paid by dividends out of the assets in the hands of the receiver. Furthermore the allowance and payment of such a claim is inconsistent with the ruling of the court in *White* v. *Knox*, 111 U. S., 784. In that case the facts, as set forth in the opinion of the court, were as follows:

The Miners' National Bank of Georgetown was put into insolvency by the comptroller of the currency, and a receiver appointed about the 20th of December, 1875. It owed a large amount of debts, and among the rest about $60,000 to White, the relator, which the comptroller refused to allow. White thereupon brought suit to have his claim adjudicated, and on the 23d of June, 1883, he recovered a judgment against the bank for $104,523.72, that being the amount of his claim with interest added to the date of the judgment. Between the time of the failure of the bank and the judgment, the comptroller had paid to the other creditors, under the requirements of section 5236 of the revised statutes, ratable dividends, amounting in the aggregate to sixty-five per cent. on the amounts due them respectively, as of the date

when the bank failed. As soon as the claim of White was adjudicated, the comptroller calculated the amount due him according to the judgment as of the date of the failure, and paid him sixty-five per cent. on that amount. The sum paid in this way was $46,560.75, which, it was conceded, was the true amount due him on the basis of distribution assumed by the comptroller. White claimed that the dividend should have been paid on the face of the judgment, which would have given him $67,940.41. The difference between the amount claimed and that paid was $21,379.66. The suit was brought to compel the payment of that difference. The court below decided in favor of the comptroller, and White sued out a writ of error for the review of a judgment to that effect.

The court in deciding the case, among other things, say:

" The comptroller decided that the payment to White " should be on the basis of the amount due him on his " adjudicated claim as of the date of the failure of the " bank, because the dividends to the other creditors " had been calculated in that way, and all he was en- " titled to was a share in the proceeds of the assets " equal to what had been distributed to others during " the pendency of his litigation. In this we think the " comptroller was right. Dividends are to be paid to all " creditors ratably, that is to say, proportionately. To " be proportionate they must be made by some uniform " rule. They are to be paid on all claims against the bank " previously proved and adjudicated. All creditors are to " be treated alike, *The claim against the bank, there-* " *fore, must necessarily be made the basis of the appor-* " *tionment.*

" If the comptroller is satisfied with the proof which " is furnished to him he can allow the claim, and when " the allowance is made, the creditor becomes entitled " at once to participate in all dividends that may be de- " clared. If the comptroller declines to recognize the " claim as valid, it must be established by the adju- " dication of some competent court before it can share " in the distribution of assets. *When adjudicated in " favor of the creditor, it is established as a claim " against the bank, and must be treated accordingly by " the comptroller.*

" *The business of the bank must stop when insolveney " is declared.* (Rev. Stat., Sec. 5,228.) *No new debt " can be made after that.* The only claims the comp- " troller can recognize in the settlement of the affairs of " the bank are those which are shown by proof satisfac- " tory to him, or by the adjudication of a competent " court, *to have had their origin in something done be- " fore the insolvency.* It is clearly his duty, therefore, " in paying dividends, to take the value of the claim *at " that time* as the basis of distribution. If interest is " added on one claim after that date, before the percent- " age of dividend is calculated, it should be upon all, " otherwise the distribution would be according to differ- " ent rules, and not ratably as the law requires.

" It is insisted, however, on the part of the relator, " that he is entitled to dividends on his judgment, as " that is the amount adjudicated to him, and the advant- " age he will get in this way is no more than just, be- " cause of the trouble and expense he was put to in car- " rying on his litigation, and the delay he has suffered " in getting his money. The question here is not " whether he should be paid interest on the several items

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" ed, but whether the amount of his judgment must be
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" relator on the amount due him at that time, and the
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Another illustration of the effect of the insolvency of a national bank, and the appointment of a receiver upon claims against it is to be found in *Chemical National Bank* v. *Armstrong*, 59 Fed. Rep., 372, decided by the Circuit Court of Appeals of the Sixth circuit, in which TAFT, C. J., in discussing the nature of a claim against an insolvent national bank, among other things, says:

" The claim as proven is a claim *in rem*, and not *in*
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" pension, and the vesting of the title of the assets in " the receiver. *White* v. *Knox*, 111 U. S., 784, 4 Sup. " Ct., 686; *Richmond* v. *Irons*, 121 U. S., 27, 64, 7 " Sup. Ct., 788; *Warrant Finance Co.'s Case*, 4 Ch. " App., 643; *In re Joint Stock Discount Co.*, 5 Ch. App., " 86.

" It is true that if the assets are more than sufficient " to pay all debts, then the creditors are allowed divi- " dends to pay the interest due from the debtor bank " (*National Bank of Commonwealth* v. *Mechanics' Nat.* " *Bank*, 94 U. S., 437); but in the measuring of the " share of each creditor in the fund, interest beyond the " date of suspension is not calculated. It will not do to " say that the date fixed for stopping of interest on all " claims is a mere matter of convenience in calculation, " which works no injury to any one, because all are " treated alike. The creditor with a debt bearing eight " per cent. interest is very injuriously affected in com- " parison with the creditor whose debt bears but four. " The contract of the former against the debtor entitled " him to double the compensation for delay in payment " which the latter was to receive, and yet in the distri- " bution of the assets, for which they both may have to " wait several years, the former has no advantage over " the latter. If the ratable share of creditors in the as- " sets must vary with the increase or decrease of the debt " against the debtor, the refusal to allow interest on " claims beyond the date of suspension would be a gross " injustice to those who are entitled by contract to the " higher rates of interest. The only principle upon " which the rule adopted by the Supreme court in *White* " v. *Knox*, 111 U. S., 784, 4 Sup. Ct., 686, and by the " court of chancery appeals in *Warrant Finance Co.'s*

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"*Case*, 4 Ch. App., 643, can be supported is that, *upon* "*the transfer of the assets by operation of law to a* "*trustee for creditors, the rights of creditors in the as-* "*sets are fixed, and are to be determined as of that date*, "and are not affected by what may subsequently affect "the debt by reason of which they acquire their interest "therein, subject always to the limitation that the "amount to be received by them from all sources shall "not exceed their original debt and interest."

It seems to us it ought to require no argument to show that the rulings in the two cases last cited are wholly irreconcilable with the position contended for on behalf of the plaintiff in the case at bar. As the plaintiff's claim had no existence at the time of the suspension of the bank, the relations between it and the defendant being merely those existing between the parties to a contract purely executory on both sides, and which might never be performed by the plaintiff on its part, and which, as we have already seen, it had the option to perform or not to perform as it might thereafter deem best for its own interests, it then had no value which could be taken by the comptroller as the basis of distribution of the assets of the insolvent association declared to be the proper basis in *White* v. *Knox*. Furthermore to hold that the rights of the plaintiff in the assets were fixed and determined *at the date of the suspension*, as is held necessary in *Chemical National Bank* v. *Armstrong*, is to hold that it has no claim at all, for no part of the claim upon which it now relies accrued in its favor until August 1, 1893, nearly three months after the bank's suspension, and then only $1,000 thereof with the possibility of an additional claim for a like sum on the first day of each succeeding month.

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Furthermore, the distribution of the assets of an insolvent National bank, like the administration of any insolvent estate and the distribution of its assets to creditors, being an equitable proceeding and governed by equitable principles, the rule that the rights of the parties in the assets are fixed and determined as of the date of the suspension is a logical and necessary consequence of that well established rule that "equity regards that as "done which ought to be done." As the insolvency of a National bank and its consequent suspension of business imposes upon the comptroller of the currency the duty of closing it up and distributing its assets, the date of the performance of such duty is, for the purpose of determining the rights of the parties in interest, regarded as identical with the date when it is imposed.

Apart from the evident soundness of the rule we are thus contending for, its application in cases of this character is absolutely essential to the carrying into effect of those provisions of the Revised Statutes regulating the distribution of the assets. By section 5,236 the comptroller is required "as the proceeds of the assets "of such association are paid over to him" to make dividends on all claims proved or adjudicated. While undoubtedly the comptroller is authorized and required to retain in his hands sufficient assets to pay a ratable portion of claims in process of adjudication, if such claims are alleged to have existed at the date of the suspension, it would be a manifest violation of his duty to retain assets for the purpose of providing for claims which had no existence either at the date of the suspension or at the date when the assets were in condition for distribution and the existence of which in the future was a matter of uncertainty. If the distribution of the assets

might be delayed because of mere possibilities that claims would accrue in the future the settlement of the affairs of a suspended bank might not be accomplished for many years, when otherwise there would be no serious delay. Thus in *Fidelity Safe Deposit and Trust Co.* v. *Armstrong*, 35 Fed. Rep., 567, the lease was for a term of twenty years, and had the court held it to remain in force after the suspension of the bank and adjudged the lessor entitled to prove up a claim for the rent as it might accrue each month during the entire term, it would have been impossible to settle up the affairs of the bank until the lease was either terminated by lapse of time or by consent of the lessor, who might give or withhold that consent as he deemed best for his own interests.

Again, as we have already shown, the claim of the plaintiff is one which is based upon a contract which, at the date of the suspension, and by reason of the insolvency of the defendant, became a contract with respect to which the plaintiff had an option to perform on its part or not, as it might see fit. Whether it would assert any claim under the lease was not dependent upon anything but its own volition. The lessee was powerless to continue the lease in force against the wishes of the lessor. Its position was precisely that of a party who had entered into a contract the performance of which was purely optional on the part of the other party. It is evident, therefore, that if, under the circumstances shown by the agreed statement of facts, the plaintiff can maintain this claim, obtain judgment thereon and payment of such judgment by dividends out of the assets, any person having a contract with a National bank by which he has secured a mere option to sell property to the bank or buy it from the bank must be regarded as

having a claim within the meaning of sections 5,235 and 5,236 of the Revised Statutes, which he can prove up or establish by suit against the bank at any time he may see fit to exercise the option; provided, of course, it be exercised within the time limited by the contract.

To concede the right of a claimant to prove up a claim against an insolvent National bank upon one form of option contract, carries with it the consequence that a claim may be proven up under all forms of option contracts, assuming, of course, that they were valid when made. And this in turn produces a consequence that the affairs of an insolvent National bank must remain unsettled until the expiration of the time within which all its outstanding contracts that are purely optional are to expire.

If it be claimed that the rule we seek to have applied is one which may work hardship, it is sufficient to say that, the rule being one well established, the lessor is presumed to have known of it when it made this lease, and accordingly the lease was made with the knowledge that it might be terminated by means of the insolvency of the association, and its being closed up under the provisions of the national banking law by the appointment of a receiver. It is no hardship to enforce against a party a rule of law which, at the time he makes his contract, he has full knowledge of, and which he knows may, in the course of events, be enforced against him.

As is well said in *Fidelity Safe Deposit and Trust Co.* v. *Armstrong*, 35 Fed. Rep., 567, "all these proceedings "of the receiver are in strict conformity with the statute "which was in force at the time this lease was made and "which this complainant was bound to recognize, and, "having failed to provide against the contingency that

" has arisen, he is not entitled to the relief which he " seeks."

For these reasons we insist that a claim for rent accruing and falling due after the insolvency and suspension of a national banking association, not being an existing demand at the time of such suspension, cannot be proven up and paid out of the assets in the hands of the receiver.

But the Supreme Court of Illinois, in its opinion (Rec., 56), among other things, says:

" But it is said a claim to be entitled to be proven up " and paid by dividends out of the assets of a national " banking association in the hands of a receiver must be " one which, at the date of the suspension of the asso- " ciation, was an existing demand, and the claim for rent " under this lease is not such a demand. The lease ex- " ecuted between the bank and the appellee was a valid " contract. The premises were leased for a term of five " years from May 1, 1893, at $12,000 per annum, pay- " able in monthly installments of $1,000 in advance. " The bank went into possession of the premises on the " 1st day of May, 1893, and $1,000 was due on the rent " on that day. The money was not paid, and there was " then a breach of the contract, for which an action " might have been maintained, and this occurred nine " days before insolvency. There is, therefore, no foun- " dation for the position of counsel that the claim of ap- " pellee was not an existing demand at the time the bank " suspended. The amount of damages may not have " been as large on the first day of May, 1893, as at a " later period, but on that date there was a breach of " the contract and a right of action for such breach."

Even were the facts as stated by the Supreme Court of Illinois they would not justify its conclusion. The claim of the plaintiff to a right of recovery was not based upon a breach of the contract alleged to have occurred on the first day of May, 1893, prior to the bank's suspension of business, but it was based upon the several breaches of the contract which occurred after the appointment of the receiver, and on the first day of August, 1893, and on the first day of each month thereafter down to the time of the commencement of this suit. Even had there been a breach on the first day of May, 1893, and therefore an existing demand at the time of the appointment of the receiver, such existing demand would have been one only for the rent for the month of May, and could not have properly been held to entitle the plaintiff to recover for the subsequent several demands, each of a month's rent, accruing after the receiver's appointment.

But the Supreme Court of Illinois was mistaken as to the facts, its mistake being induced by a misleading statement contained in the opinion of the Appellate Court, and which, we regret to say, counsel for the defendant in error, in their argument filed in the Supreme Court, sought to and did take advantage of for the benefit of their client. By reference to the stipulation (Rec., 37) it will be perceived that it recites that "afterwards and "*on or about* the first day of May, A. D. 1893, said "Chemical National Bank of Chicago took possession "under said lease of the rooms to it thereby demised, "and continued to retain possession thereof under said "lease until the 9th day of May, A. D. 1893," and (Rec., 39) that "on the 27th day of July, A. D. 1893, "said John P. Hopkins, as receiver as aforesaid, paid to "said Hartford Deposit Company the sum of $2,709.68,

" being the total amount of rent due from said Chemical " National Bank of Chicago, and the said receiver to " said Hartford Deposit Company under said lease " down to and including the 31st day of July, A. D. " 1893."

It thus appears that if there was any breach of the contract on the first day of May, 1893, the plaintiff subsequently received everything that was due to it down to and including July 31, 1893. Although the stipulation does not state in express terms that the Chemical National Bank paid the rent accruing from May 1st to May 9th, yet if, as is recited in the stipulation, $2,709.68 was the total amount of rent due from the bank and the receiver down to and including July 31, 1893, it follows as a necessary consequence that the rent from May 1, 1893, to May 9, 1893, must have been paid. Indeed, there is nothing in the stipulation from beginning to end to support any claim on the part of the plaintiff for rent accruing down to May 9, 1893, and besides, the fact that the judgment of the Appellate Court is for $9,000, which is the precise amount of rent claimed for the months of August, 1893, to April, 1894, inclusive, and that such judgment has been acquiesced in by the plaintiff, is quite satisfactory evidence that it has made no claim for any rent accruing prior to August 1, 1893. The fact is and was that at the time the defendant took possession of the banking rooms the plaintiff had not succeeded in completing them so that they were in a tenantable condition, and did not succeed in so doing until some time after the bank's suspension of business, and by reason of this failure on its part, the rent accruing down to May 9, 1893, the date of the suspension, was waived by the plaintiff as compensation to the defendants for not having the banking rooms in a

state suitable for occupancy on the day agreed upon. Doubtless counsel for defendant in error, in presenting their views to this court, as their attention is now especially called to this matter, will decline to persist in arguing that the stipulation shows something which it manifestly does not show, and which is contrary to the truth. It may be stated, as a general rule, that "truth is mighty "and will prevail" and this case, we confidently predict, will prove no exception.

III.

AFTER THE APPOINTMENT BY THE COMPTROLLER OF THE CURRENCY OF A RECEIVER OF A NATIONAL BANKING ASSOCIATION NO JUDGMENT CAN BE RENDERED AGAINST SUCH ASSOCIATION OR ITS RECEIVER FOR ANY CLAIM, WHICH, AT THE DATE OF THE BANK'S SUSPENSION, WAS NOT AN EXISTING DEMAND.

That the appointment of a receiver of a national banking association by the comptroller of the currency does not prevent its being sued has been expressly decided. The opinions of the court, however, clearly establish the proposition that no recovery can be had for any claim which is not entitled to be paid out of the assets in the hands of the receiver.

In *Bank of Bethel* v. *Pahquioque Bank*, 14 Wall., 383, the facts were as follows:

On the 21st of February, 1868, the First National Bank of Bethel failed to redeem some of its circulating notes. They were protested, and on the 26th of February, 1868, a receiver was appointed by the comptroller of the currency under the National Banking Act, and

said receiver immediately entered upon the discharge of the duties of his office. The Pahquioque bank asserted that it was a creditor of the Bethel bank, and presented its claim to the receiver. The receiver, however, disallowed it. The Pahquioque bank thereupon, on the 30th day of May, 1868, brought assumpsit in the Superior Court of Fairfield county, a court of Connecticut having jurisdiction in similar cases, against the Bethel bank, which defended itself against the claim on the following, among other grounds:

1. That the courts of the United States alone had jurisdiction after the appointment and acceptance of the receiver.

2. That prior to the suit brought the Bank of Bethel had forfeited its charter by a violation of the Currency Act in not paying its notes, and could not be sued anywhere.

3. That it could not be sued because it was at the time under the control and in possession of a duly appointed receiver "incapable of self-defense and entitled "to the legal protection and guardianship thrown about "it by the law."

4. That the decision of the receiver on the presentation of the claim was conclusive on the parties to the suit as an adjudication unless set aside by the comptroller of the currency, or by some court of the United States having jurisdiction.

But the court gave judgment for the Pahquioque Bank for the full amount of its claim, and this judgment was affirmed by the Supreme court of the state. The case was thereupon removed by writ of error to the Supreme court of the United States.

In delivering the opinion of the court Mr. Justice CLIFFORD, after calling attention to the various provisions of the National Bank Act, providing for the appointment of a receiver by the comptroller of the currency, and the winding up of the association and the distribution of its assets through such receiver, among other things says:

"None of these proceedings, however, support the "theory that the association ceased to exist when the "receiver was appointed, nor at any time *before the as-* "*sets of the association are fully administered and the* "*balance, if any, is paid to the owners of the stock or* "*their legal representatives.* * * *

"Express power to sue and be sued, complain and de- "fend, in any court of law and equity, is conferred on "such associations by the eighth section of the act pro- "viding for their organization, and it seems quite clear "that the association is a proper party to be sued in all "matters in which the corporation is interested, unless "the association is disqualified for that purpose by virtue "of the appointment of a receiver by his subsequent ac- "tion as such under his appointment. Neither power to "sue nor to be sued in such cases is anywhere in terms "conferred upon the receiver, nor upon the comptroller "of the currency in any case except when he institutes a "suit to forfeit the rights, privileges and franchises of the "association, and in that case the provision is express "that the suit shall be in his own name. Beyond "doubt the appointment of a receiver supersedes the "power of the directors to exercise the incidental "powers necessary to carry on the business of bank- "ing, as the receiver is required to take possession "of the books, records and assets of every descrip- "tion of the association, and from that moment the

" association is forbidden to pay out any of its notes, " discount any notes or bills, or otherwise prosecute the " business of banking; but the corporate franchise of the " association is not dissolved, and the association, as a " legal entity, continues to exist, as is shown to a dem- " onstration by the fact that it is required safely to " keep the money on hand belonging to it, and may de- " liver special deposits in its keeping to the rightful " owners.

" Much aid cannot be derived from authorities in the " examination of this proposition, as the question turns " chiefly, if not entirely, upon the construction of the " act of Congress, and suffice it to say that we are all of " the opinion that the act contains nothing in its subse- " quent provisions inconsistent with the theory of the " plaintiffs that the association may sue and be sued, " complain and defend, *in all cases where it may be* " *necessary that the corporate name of the association* " *shall be used for that purpose in closing its business* " *and winding up its affairs under the provisions of* " *the act which authorized its formation.*

" Suits and proceedings under the act, in which the " United States or their officers or agents are parties, " whether commenced before or after the appointment " of a receiver, are to be conducted by the district attor- " ney under the direction of the solicitor of the treasury, " and no doubt is entertained that the directors, from " the time a receiver is appointed, cease to have any " power in respect to such matters, and that the control " and supervision of the same are vested in the proper " officers of the United States. *Claims presented by* " *creditors may be proved before the comptroller, or may* " *be established by suit against the association in any*

" *court of competent jurisdiction.* Creditors, say the " court in that case, must seek their remedy through the " comptroller, in the mode prescribed in the act of Con- " gress, and cannot proceed directly in their own names " against the stockholders or debtors of the corporation. " Suits may be brought by the receiver, both at law or " in equity, and the express decision there is, that he may " sue in his own name or in the name of the association " *for his use*, and no reason is perceived to doubt the " correctness of the rule adopted in that case, though " the act of Congress does not in terms give him author- " ity to sue in his own name.

" Enough has already been remarked to show that the " fourth proposition of the defendants cannot be sus- " tained, as the act of Congress provides that the re- " ceiver, in making the basis for a dividend, shall include " in the list not only claims proved before him to his " satisfaction, but claims also adjudicated in a court of " competent jurisdiction.

" Attempt is made to show that the adjudicated claims " there referred to, are only such as had been adjudicated " before the receiver was appointed, but the court is of " the opinion that such a construction is not warrantde " either by the language employed, or the subject-matter " to which it relates, or the purpose to be accomplished, " or by the analogies of the law or the usual rules of in- " terpretation, which courts apply in ascertaining the " meaning of a legislative provision of a remedial char- " acter. Tested by any one or all of these criterions, the " court is of the opinion that the construction assumed " by the defendants is quite too narrow to carry into " effect the intention which the framers of the provision " had in view at the time it was adopted. *Claims pre-*

" sented by creditors may be proved before the receiver,
" or they may be put in suit in any court of competent
" jurisdiction, as a means of establishing their validity
" and to determine the amount owed by the association,
" but the judgment when recovered will not give the
" creditor any lien on the property of the delinquent as-
" sociation, nor secure to the judgment creditor any
" preference over other creditors whose claims are proven
" before the receiver. All alike must await the action
" of the comptroller of the currency, and be content with
" a just and legal distribution of the proceeds of the as-
" sets collected by the receiver and liquidated by the
" comptroller according to the act of Congress in such
" case made and provided.

" Nothing further need be remarked in respect to the " other errors assigned, as it is clear that the conclusions " announced dispose of all the questions in the case " which are examinable under the writ of error to a state " court."

In *White* v. *Knox*, 111 U. S., 784, as we have already seen, it was held that the business of the bank must stop when insolvency is declared; that no new debt can be made after that, and that the comptroller, in paying dividends, must take the value of the claim at that time as the basis of distribution, regardless of the amount of the judgment that may be rendered by the court in the suit in which the claim is adjudicated. In other words, the comptroller is not bound to pay out of the assets whatever judgment any court of competent jurisdiction may see fit to render against the bank, but it is his duty to so far inquire into the cause of action upon which the suit is based as to ascertain whether such cause of action was, at the date of the insolvency of the bank, an existing

demand against it, and the amount of such demand as it then existed. This duty on the part of the comptroller is wholly inconsistent with the theory that the comptroller would be authorized to pay any judgment against a national banking association in the hands of a receiver that was based upon a claim that did not arise until after the bank's insolvency.

Such being the duty of the comptroller with respect to the payment of dividends on claims thus adjudicated, it would seem to follow as a necessary consequence that whenever, in any suit brought against a national banking association after the appointment of a receiver on account of its insolvency, such insolvency and appointment of a receiver is made to appear to the court, it is the court's duty, and it has no lawful power to do otherwise, to ascertain whether the claim upon which the suit is based was, at the date of the bank's insolvency, an existing demand, and, if it was not, to reject it and enter judgment in favor of the defendant, notwithstanding it may appear that, had the bank not become insolvent and had no receiver been appointed, the plaintiff would be entitled to judgment for the demand upon which his suit is based. It would be idle to render a judgment against a national banking association in process of being closed up through the appointment of a receiver, the payment of which never could be enforced either by means of dividends paid through the comptroller of the currency or by other proceedings.

We respectfully insist that the judgment of the Superior Court was right and should have been affirmed, and that of the Appellate Court was erroneous. Conse-

quently, the Supreme Court of Illinois should have reversed the judgment of the Appellate Court and affirmed that of the Superior Court, and for its failure to do so its judgment should be reversed and the cause remanded, with directions to reverse the judgment of the Appellate Court and affirm that of the Superior Court.

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For Plaintiff in Error.